IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,136

JOHNNY L. ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF TEE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Robinson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R1" -- record on direct appeal to this Court;

"R2" -- record on direct appeal to this Court after resentencing;

"PC-R" -- record on instant 3.850 appeal to this Court (volumes I thru XXIX, numbered pages 1 thru 6159);

"Supp. PC-R" -- supplemental record on instant 3.850 appeal to this Court (volume XXXV, numbered pages 6165 thru 6172);

"T" -- transcript of evidentiary hearing (volumes XXX thru XXXIV, numbered pages 1 thru 628);

"Def. Ex." -- exhibits submitted at the evidentiary hearing;

"App." -- appendix to Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Robinson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Robinson, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Robinson was indicted for first degree murder and other offenses (R1. 2, 10-11), and pled not guilty. Trial was held in May, 1986. The jury found him guilty (R1. 75-78, 702), and recommended death by a nine to three vote (R1. 81, 841). The court imposed death (R1. 144-48, 893-99). Robinson's conviction was affirmed but his sentences were vacated. Robinson v. State, 520 So. 2d 7 (Fla. 1988).

At resentencing the jury recommended death by an eight to four vote (R2. 69, 713). The court imposed death (R2. 109-14, 732-38). The sentences were affirmed. Robinson v. State, 574 so. 2d 108 (Fla. 1991), cert. denied, Robinson v. Florida, 112 S. ct. 131 (1991).

In May, 1993, Robinson filed his motion under Rule 3.850. The court heard argument (PC-R. 6036, et seq.), summarily denied some claims and ordered an evidentiary hearing on others (PC-R. 1222-28). Although Robinson's counsel requested funding for 52 out-of-town witnesses to testify at the evidentiary hearing (PC-R. 781-86, 1232-33; T. 566-67) and the State refused to stipulate to affidavit testimony (PC-R. 782, 6038-39), the court denied the request and limited Robinson to 8 witnesses (PC-R. 1227, 1235; T. 568-69). Defense counsel objected that the court's rulings hampered Robinson's ability to present his case (T. 567-69, 571, 302-04, 557-59).

Robinson attempted to present the testimony of codefendant Clinton Fields, who had signed an affidavit stating that his

trial testimony against Robinson was not truthful (App. 1). When Fields refused to testify (T. 243), the lower court refused to admit his affidavit in evidence (PC-R. 5764), over objection (T. 244-45, 252-53). Trial counsel Pearl testified that Fields' trial testimony was essential to the State's case (T. 174-75), and that Fields' affidavit supported an intoxication defense, negated any specific intent and kidnapping, and provided evidence showing Fields' testimony was rehearsed (T. 176-78, 179, 159-60, 167-68). Fields' affidavit was corroborated by the testimony of his attorney, Cushman (T. 77, 90-92, 98, 116, 117), by the prior deposition of police officer Porter (Def. Ex. 3), and by prosecutor Alexander's prior testimony (Def. Ex. 1). Cushman also testified that Fields had a specific deal with the state regarding his testimony (T. 82, 100, 103). Pearl testified the state did not provide him Fields' oral statement to Porter (T. 143-45, 152-53, 204-06), which was inconsistent with Fields' trial testimony and which Pearl would have used to support the defense (T. 147-49).

Pearl testified he conducted no penalty phase investigation but relied on psychologist Krop to do that (T. 181-83, 228-29, 622, 624). One month before resentencing, Pearl wrote to Robinson asking for names of potential witnesses, and Robinson immediately provided names (T. 184; Def. Ex. 10). Pearl did not contact the witnesses but forwarded Robinson's reply to Krop (T. 185, 270). Krop did not know he was to do the investigation and did not do it (T. 262-64, 265), except for the night before

resentencing when he tried to contact the witnesses Robinson had named (T. 272-73, 378). Attorney expert Doherty testified that Pearl's preparation for resentencing was below the standard of reasonably effective counsel (T. 482, 492, 496, 499-504, 541). Robinson provided information about his background to Pearl (Def. Exs. 10, 11, 12), to Krop (St. Ex. 3; T. 450), to the PSI preparer (PC-R. 3933, 3939, 3940), and to co-counsel Quarles during the resentencing (Def. Ex. 16).

Ethyl and Warner Byrd testified regarding Robinson's early childhood (T. 24-50, 59-68), and the court found them "highly credible witnesses" (T. 568). Other witnesses could have testified had the court granted expenses (Apps. 9, 10, 12, 13, 14, 15, 18, 20, 21; PC-R. 719-78). Krop testified that he had reviewed background information since testifying at resentencing (T. 278-80). As a result, Krop changed his diagnoses (T. 281-91, 340, 345) and stated that his resentencing testimony was inaccurate and not a fair summary of Robinson's life (T. 294-302, 426).

After the evidentiary hearing (T.1, et seq.), the court denied relief (PC-R. 5763-86). Timely notice of appeal was filed (PC-R. 5888), and this appeal followed. On January 6, 1997, a 246-page initial brief and a motion for extension of page limitation were filed. The Court ordered a 100-page brief filed. A 190-page initial brief and a motion to reconsider the page limitation were filed on January 24, 1997. The Court ordered a 100-page brief filed. In compliance with the Court's order,

Robinson now files the instant brief but does not waive any claims or arguments by doing so.

SUMMARY OF ARGUMENT

1. Robinson is innocent of first degree murder and a death sentence. The key trial witness, codefendant Fields, has recanted his trial testimony which provided the only evidence of first degree murder and several aggravators. Fields now states his trial testimony resulted from police pressure and was false: contrary to his trial testimony, Fields never saw Robinson hold a gun on the victim when she got in Robinson's car, Robinson never announced he was going to kill the victim because she could identify him, and the shooting happened during an argument between Robinson and the victim. This is corroborated by what Fields told his attorney and by Fields' original oral statements. This new evidence would probably result in Robinson's acquittal and/or imposition of a life sentence.

2. Although Fields met several times with the State regarding his testimony, he testified he had only one brief meeting. Although Fields and the State had a specific deal regarding Fields' testimony, Fields testified there was no specific quid pro quo. The State allowed Fields to testify falsely without correction, Further, the State did not reveal to defense counsel Fields' oral police statement which was consistent with Robinson's statement. Trial counsel testified that all of this was material to impeaching Fields and presenting the defense.

3. Robinson was denied a full and fair evidentiary hearing. The court denied funding for most of the witnesses Robinson wished to present and chose which witnesses could be presented. The State refused to stipulate to the witnesses' affidavits. The inability to present these witnesses rendered Robinson unable to prove Claims 3, 4 and 5 of his 3.850. The witnesses' testimony was essential to establishing trial counsel's failure to investigate mitigation and the prejudice to Robinson. A new evidentiary hearing is required.

4. Claims 3, 4 and 5 of the 3.850 all concerned trial counsel's failure to investigate mitigation. Counsel testified he conducted no investigation into Robinson's life, and spoke to no penalty phase witnesses other than the mental health expert, Dr. Krop. Counsel assumed Krop would do the investigation, while Krop testified that he relies on counsel to investigate. As a result, compelling mitigation was not presented, counsel presented inaccurate evidence and arguments, and Krop had insufficient information. Upon reviewing background information, Krop changed his diagnoses.

5. The lower court erred in summarily denying numerous ineffective assistance of counsel claims as procedurally barred and failed to attach to its order any files and records conclusively rebutting these claims.

6. Trial counsel was ineffective in failing to raise proper objections and to force an inquiry into Fields' refusal to testify at resentencing. Counsel failed to object under Rule

3.640(b), Fla. R. Crim. P., and Section 90.804, Fla. Stat., that Fields' prior testimony should not be read at resentencing because the State had not established Fields was unavailable and had brought about Fields' refusal to testify by breaching its agreement with Fields. Fields' testimony was the sole support for several aggravators.

7. Trial counsel provided prejudicial ineffective assistance in cross-examining Fields, failing to ask Fields about his oral police statement which contradicted his trial testimony, about the specifics of his deal with the State, and about his and Robinson's intoxication on the night of the offense.

8. Robinson's jury weighed unconstitutionally vague aggravators, and this claim was preserved.

9. Public records were not timely provided.

10. Race discrimination permeates the justice system in St. Johns County and affected prosecution of this case.

11. Trial counsel ineffectively failed to: object to improper state arguments at trial and resentencing, object to the State's injection of racial prejudice at trial, conduct jury selection properly, and disclose a conflict of interest.

ARGUMENT

I. THE INNOCENCE CLAIM.

Robinson is innocent of first degree murder and a death sentence. At trial, Robinson contended that the victim accompanied and had sex with him voluntarily, that her shooting was an accident, and that he was guilty at most of some lesser

offense, not first degree murder (R1. 593-94, 601). Prosecutor Alexander agrees that Robinson's statement supported manslaughter or second degree murder at best. Alexander has testified that Robinson's statement was a "confession to, perhaps at best, a manslaughter. . . . He admitted to holding the gun and shooting her but it was all accidental, and I did not have a whole lot of proof otherwise" (Def. Ex. 1 at 158). Fields was Alexander's "star witness," and he "needed to have Fields' testimony for a first degree murder conviction" (Id. at 157, 158).

The only contrary evidence was Fields' testimony.[1] The State granted him immunity and agreed to help him out in other ways, the exact terms of which he did not disclose (R1. 514-15, 521). Fields' testimony provided the only evidence of felonies, premeditation, and the aggravators of committed during a felony, avoid arrest, and cold, calculated. Fields testified that Robinson held a gun on the victim when he brought her to his car, and put handcuffs on the victim and took her purse (R1. 498, 499), that the victim did not consent to sex, that Robinson told him he had to shoot the victim because she could identify him (R1. 502, 504-05), and that the alcohol Robinson had been drinking had little effect on him (R1. 497). Trial counsel Pearl testified that Fields' trial testimony was "[d]evastating. A

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[1]Five state witnesses testified at trial. Detective West introduced a crimescene video, the victim's sister-in-law identified her, the medical examiner testified as to cause of death, and Detective Lightsey testified to the defendant's arrest. None of this evidence touched on the veracity of Robinson's statement.

guarantee of the death penalty" (T. 174-75). Fields' trial testimony was reread at resentencing (R2. 289-320), and was the only direct evidence to support significant aggravators and to rebut the defense argument that Robinson did not commit an intentional murder (R2. 643).

Fields has now acknowledged that his testimony was untrue and was only given in response to pressure and prompting by the police. Fields has attested in a sworn affidavit the truth about what he saw and heard. An afternoon and evening of heavy drinking preceded the incident:

> Johnny and I spent a lot of time riding around in Johnny's car drinking. Johnny was a very heavy drinker but he mostly hid it from other people.
>
> * * * *
>
> On my mother's birthday, August 11, 1985, Johnny and I were riding around and drinking all afternoon and night. We were drinking Hennesey and chasing it with beer. In the evening . , . we went to a birthday party . . . We drank a whole bunch more there, liquor and beer. We stayed there for a couple of hours and then we left in Johnny's car, still drinking. By this time, we had drank way too much, at least a fifth of Hennesey's, a pint of gin, and about three (3) six-packs between the two of us. We was both very high -- way over the limit.

(App. 1).

Robinson stopped behind a disabled car and came back with a woman, but he was not holding a gun on her.

> Out on 1-95, we passed a car that was stopped on the side of the road. Johnny pulled over like he always did to see if they needed help. I waited in the car and Johnny went over to the other car. He came back to the car a few minutes later with a heavy set white lady. I testified that Johnny was holding a gun on her, which is not true. The police told me to put that in my statement, and I just went along with it.

Id. What followed was a tragic accident, rather than a planned killing:

> Johnny never made a statement to me about how he was going to shoot the lady or "kill the bitch" or anything like that. The police put that in my statement and I went along with it, Johnny never said anything like that.
>
> What really happened was after we had sex with the lady, I went and got back in the car. Johnny and the lady were having some words back and forth. It seemed like it might have been about where we were going to go next. They had a little tussle and somehow the gun went off. I truly believe it was an accident but I can't say for sure because I could not see from where I was. I do not believe Johnny meant to shoot the lady.

Id.

After Fields' arrest, his statements and testimony were distorted by pressure, promises and coaching from the police and State:

> Some of the things that I said at [Johnny's] trial were not true. I was under a lot of pressure and I was only sixteen (16) years old when I was arrested and the police took my statement. I said what the police wanted me to say rather than what really happened. They were yelling at me and were real hard on me. I was very scared. They even told me that if I would just tell them what happened, they would let me go home. Being so young, I believed them.
>
> * * * *
>
> I spent a lot of time in the State Attorney's office before I testified. They brought me up there from the jail many times to talk to me and get me ready.
>
> This statement is made of my own free will with no pressure or promise of any kind. I want to set the record straight because I fell bad about lying on Johnny. I was only sixteen (16) and I was under heavy pressure when the police questioned me. I do not believe Johnny meant to kill that lady. I believe it was a terrible accident. We were very drunk and couldn't believe what had happened.

Id.

Thomas Cushman represented Fields at his murder trial and when Fields testified at Robinson's trial (T. 77). Cushman testified that Fields' description of the offense to him was consistent with Fields' affidavit. Cushman testified that the police told Fields he was in a lot of trouble and things would go easier on him if he told them about the offense (T. 90). Regarding the offense Fields said that the situation at the cemetery was not a "hostage situation" but a "party," that Robinson and the victim had an argument during which Robinson pushed her and the gun went off, and never told Cushman that Robinson announced he was going to kill the victim (T. 90-92). When Cushman asked Fields about the statement he gave police about Robinson shooting the victim to eliminate her as a witness, Fields "said no, the statement I gave the police was not correct" (T. 98). Fields told Cushman that Robinson said he shot the victim the second time because "he felt that no one would ever believe a nigger shot a white woman by accident" (T. 116). Fields told Cushman that the police reports' description of the shooting was untrue; the truth was "that Johnny pushed Mrs. St. George with the gun in his hand, it went off by accident" (T. 117).[2]

[2]Cushman gave similar testimony in an evidentiary hearing on Fields' federal habeas petition: Fields never told him that Robinson said anything about killing the victim beforehand, and Fields consistently told him that the sex was voluntary (Def. Ex. 1 at 120, 129-30, 141).

The evidence contained in Fields' affidavit was not available to Robinson or counsel at trial. As trial counsel testified and the lower court recognized, the only version available from Fields was that to which he testified (T. 173-74). At resentencing, Fields declined to testify (R2. 277-78, 282). Should this Court find, however, that counsel could have obtained this testimony by the use of due diligence, then counsel was ineffective. See Argument VII.

Had this evidence been presented at trial, it would probably have prevented a first-degree murder conviction and a death sentence. Jones v. State, 591 So. 2d 911 (Fla. 1991). Without Fields' testimony that Robinson put the victim in his car at gunpoint, raped her and announced he was going to kill her, the State would have lacked evidence of first-degree murder and numerous aggravators. Further, as trial counsel testified, Fields' statement in his affidavit that he and Robinson were drinking heavily and were both intoxicated would have provided the basis for an intoxication defense which trial counsel "certainly" would have used at both guilt and penalty to show Robinson's "faculties were impaired," the accuracy of Fields' account was clouded by his own intoxication, lack of intent for the underlying felonies, and lack of intent required to support aggravators (T. 176-78).[3] Counsel also would have used Fields'

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[3]Fields' new evidence would have required an instruction on voluntary intoxication. Linehan v. State, 476 So. 2d 1262 (Fla. 1985); Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985). At trial, such an instruction was denied for lack of evidence (R1. 562-63). However, Fields now says that at the time of the

statement in his affidavit that Robinson did not hold a gun on the victim as the two got in Robinson's car to show there was no kidnapping but that the victim willingly accompanied Robinson (T. 179).

> At the end of that period, I should have thought I would have had a fairly good chance of success at the guilt/innocence phase.

(T. 179).

Fields' affidavit also corroborates Robinson's report concerning his drinking the night of the offense to Dr. Krop. Krop testified that one mitigator was that Robinson was intoxicated at the time of the offense (R1. 770-71; R2. 514-16, 518, 527). At trial and resentencing, the court (and presumably the jury) rejected this mitigator because it was based solely on self report (R1. 146; R2. 112). A jury life recommendation based on such facts would have required a life sentence. Savage v. State, 588 So. 2d 975 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991).

Fields refused to testify at the evidentiary hearing (T. 243), but the lower court erroneously refused to admit his affidavit in evidence (PC-R. 5764). Defense counsel objected that the court's refusal to admit the affidavit violated Robinson's rights to due process and to present witnesses (T. 252-53). Defense counsel also argued under State v. Montgomery,

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offense, both he and Robinson were drinking heavily, Robinson was taking pain medication, and both of them were "very high--way over the limit" (App. 1). With this information a mental health expert could also have testified concerning the effect of this degree of intoxication on specific intent (App. 5).

467 So. 2d 387 (Fla. 3d DCA 1985), and State v. Nessim, 587 So. 2d 1344 (Fla. 4th DCA 1991), that the State should be required to grant Fields use immunity because prosecutorial misconduct had distorted the factfinding process (T. 244). Counsel explained that the prosecutorial misconduct included police intimidating and coercing Fields into providing his statements incriminating Robinson, the State breaching the plea agreement with Fields and Fields' former counsel, Tom Cushman, instructing Fields not to testify at Robinson's resentencing after Cushman had become an Assistant State Attorney in the office prosecuting Robinson (T. 244-45).

The court denied this claim (PC-R. 5764-65). The court's refusal to admit Fields' affidavit or to require the State to grant Fields use immunity deprived Robinson of a full and fair hearing and resulted in unsupported and unreliable findings. Without having Fields' testimony or admitting his affidavit, the lower court nevertheless viewed Fields' affidavit "with great suspicion." Without admitting any evidence on the subject, the court determined that co-defendant Fields had no reason to lie originally, but now is "mad" at the State and has a reason to lie. However, there is no evidence in the record that Fields is "mad" at the State. The court thus made findings based on nothing.

Further, the court's reasoning is misplaced. Fields did not originally testify out of the goodness of his heart. The State

granted immunity and agreed to help him out in other ways.[4] Fields had already been convicted, but not sentenced. Fields had great motivation to lie at trial.

Based on no evidence from Fields, the court below also stated that Fields' proposed testimony the shooting was accidental would be "extremely incredible," ignoring the fact that Fields' oral statement to Captain Porter was entirely consistent with his affidavit and supported the accidental shooting defense. At his deposition in Fields' case, Porter testified:

> Q All right. When it came to the time when she was actually shot, did you have any impression that she was basically talking back to Robinson?
>
> A Yes, sir. According to what Mr. Fields told me, I got that impression.
>
> Q All right. At any point, did you get access to what Robinson had said?
>
> A Fields said something to the effect of, somehow or another in the conversation that Robinson had called her a bitch and at that point, she either pushed him or slapped at him or something like that and in turn, he slapped at her or used his gun to threaten her with and that's when he shot her. That's when Robinson shot her.

(Def. Ex. 3 at p. 33). The lower court also ignored the fact that Fields' affidavit is consistent with the statements he gave his attorney, Cushman (T. 90-92, 98, 117).

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[4]At a hearing on Fields' federal habeas petition, prosecutor Alexander testified that after Fields' trial, he and Cushman agreed Fields would testify for the State in Robinson's trial in exchange for Alexander's recommendation that Fields' sentences run concurrently and informing the Clemency Board of Fields' cooperation (Def. Ex. 1 at 152, 156-57).

Finally, the lower court accepted that three of the six aggravators the court found depended upon Fields' testimony (PC-R. 5765). However, the court ignored the effect on the jury of the State being unable to prove these three aggravators and stated three aggravators were proven without Fields' testimony, including, according to the lower court, the felony murder aggravator (Id.).

The court below erred regarding the felony murder aggravator. Fields' testimony was the only evidence of kidnapping and rape. Robinson always contended that the victim accompanied him and had sex with him voluntarily. Fields' testimony was the only evidence to support the felony murder aggravator.

If Fields had testified consistently with his affidavit, and consistently with Robinson's sworn statement, then there would have been at best only circumstantial evidence of the underlying felonies, and of the felony murder aggravator. Thus, the State would have been unable to prove four of the six aggravators. Robinson is entitled to a new evidentiary hearing at which he will have a fair opportunity to prove this claim and to relief.

II. THE BRADY/GIGLIO CLAIM.

In Claim II of his motion, Robinson plead that the state knowingly presented false evidence at trial and resentencing and failed to disclose exculpatory information, contrary to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405

U.S. 150 (1972). These allegations concerned Fields' trial testimony.

A. FALSE EVIDENCE CONCERNING THE FACTS OF THE OFFENSE

At trial, Fields testified falsely as to at least two critical facts -- that Robinson held a gun on the victim when they came to his car and that Robinson said he had to kill the victim because she could identify him. In fact, Fields never saw Robinson holding a gun on the victim, Robinson never told Fields he was going to kill her, and the shooting was an accident during an argument (App. 1). Fields testified falsely as a result of pressure and prompting by the police (App. 1). Fields' affidavit is corroborated by his lawyer Cushman (T. 90-92, 98, 117).

The police were aware that Fields was testifying falsely to a police version of the facts. The officers who took Fields' statement were Porter and Cannon, the highest ranking officers in the St. Johns County Sheriff's Office, who cooperated closely with the prosecution (see Def. Ex. 3 at pp. 4, 14-15, 20). The State Attorney is charged with their knowledge of the falsity of Fields' testimony. Eorham v. State, 597 So. 2d 782 (Fla. 1992).

When the State presents false evidence or allows it to go uncorrected, the evidence is material if there is any reasonable possibility that the evidence could have "affected the judgment of the jury." Napue v. illinois, 360 U.S. 264, 269, 271 (1959). Here, there can be no question that Fields' testimony was the critical state evidence. See Argument I.

The lower court did not specifically address this aspect of Robinson's Claim II (see PC-R. 5765-66). Although Fields refused to testify at the evidentiary hearing, the lower court initially refused to admit his affidavit over defense counsel's objections (T. 243, 251, 252-53, 244-45). However, Fields' affidavit was then admitted as part of State's Exhibit 10 (PC-R. 3897, et seq.; T. 455). The lower court also failed to consider Cushman's testimony (T. 90-92, 98, 117), and Porter's deposition (Def. Ex. 3), both of which corroborate Fields' affidavit. See Argument I. This evidence establishes Robinson's entitlement to relief.

B. FALSE EVIDENCE AS TO CONTACTS AND DEAL WITH PROSECUTOR

At trial, Fields testified that he met with the prosecutor only once, when they talked for five or ten minutes (R1. 518-19). This testimony was false; in fact, Fields "spent a lot of time in the State Attorney's Office" before he testified. "They brought me up there from the jail many times to talk to me and get me ready" (App. 1). Fields' affidavit is corroborated by the testimony of prosecutor Alexander.[5] Alexander was aware that Fields' testimony that they only talked once for five to ten minutes was false, yet he did nothing to correct it, contrary to Giglio and Napue.

[5] Cushman gave Alexander "carte blanche" to talk to Fields without Cushman being present (Def. Ex. 1, at 158). Alexander talked to Fields "a number of times, three, four, five times" prior to Robinson's trial (Id.). Alexander tried to build rapport with Fields and, along with his investigator, questioned Fields about the case numerous times (Id. at 159). Alexander recalls that Fields was "extremely serious. He followed all the little tips that I gave him" (Id. at 165).

Trial counsel testified that it "might impress the jury if [Fields] said [he had met with the prosecutor] a half a dozen times" because "I could have said that Mr. Fields needed to rehearse and memorize his testimony because much of what he said was invented and untrue" (T. 159-60). Pearl was not aware that the prosecutor had talked to Fields quite a bit; if he had known that the prosecutor's investigator had repeatedly asked Fields questions, he would have called the investigator as a witness "to testify to the number of times he'd seen Fields and the subject matter covered with him" (T. 167-68).

Fields also testified he had no specific agreement with the State (R1. 514). His attorney, Cushman, testified that there was a specific agreement that when Cushman sought clemency for Fields, the prosecutor would assist by writing a letter to the Clemency Board (T. 82). Cushman understood the deal to mean that the prosecutor would recommend clemency (T. 100, 103).

The prosecutor did nothing to correct Fields' testimony regarding his deal with the State. A deal did exist, and Alexander was aware of it. In Fields' deposition, Alexander explained in detail the deal with Fields (Def. Ex. 2 at 4-6).[6] Eliciting anything to the contrary from Fields violated *Giglio*.

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[6]The deal included granting Fields use immunity for this case and all other crimes Fields had committed in the Seventh Judicial Circuit, dismissal of an armed robbery/sexual battery case against Fields, notifying any other Florida jurisdictions of Fields' cooperation and recommending those jurisdictions dismiss any cases against Fields, recommending a life sentence on Fields' murder conviction and concurrent sentences on his other convictions, and writing a letter on Fields' behalf to the Clemency Board.

The court below stated Fields was only asked at trial how many times he "practiced" his testimony (PC-R. 5765). While Fields was asked how many times he had "practiced" his testimony, he lied when he stated he had only practiced the testimony once. Alexander's own testimony establishes this (Def. Ex. 1 at 158, 159, 165). The lower court also failed to consider trial counsel's testimony that if he had known about the number of meetings between the prosecution and Fields, he would have used that evidence to show Fields had to rehearse his testimony because it was untrue. The lower court did not address the State's failure to correct Fields' false testimony concerning his deal with the State.

Fields' false testimony regarding his contacts and agreement with the State was material. On cross, defense counsel tried to show that Fields' testimony was coached, and that he expected help from the State (R1. 518, 520-22). Fields' false testimony thwarted that effort. Had the jury learned the truth, they might well have found Fields not credible, and either convicted Robinson of a lesser offense or recommended life.

c. FAILURE TO DISCLOSE INFORMATION CONCERNING PRIOR INCONSISTENT STATEMENTS BY FIELDS

In discovery, the State provided Fields' written and taped statements (see R1. 3-4). However, Fields also gave oral unrecorded statements to Captain Porter (Def. Ex. 3, pp. 26-33), which were inconsistent with his later testimony. Fields told Porter that the victim was shot during an argument between

Robinson and the victim, not as the result of an announced decision to shoot her (Def. Ex. 3 at 33).

Fields' lawyer Cushman took Porter's deposition. Cushman did not notify Pearl of this deposition, Pearl did not attend it, and Cushman did not give Pearl a copy of it. Pearl never saw a copy of Porter's deposition, and was not aware of the oral statements made by Fields to Porter (T. 143-145). Pearl's file does not contain Porter's deposition (T. 152-53). Although Pearl knew Fields had given a written statement to Porter, he did not know about the oral statement, did not look in Fields' court file for a deposition, and did not confer with Cushman about it (T. 204-206).[7]

Pearl would have used the oral statement to cross Fields, to show the shooting was accidental, not intentional, and supported only manslaughter, would have called Porter as a witness, and would have argued the oral statement was consistent with Robinson's statement. Pearl also would have used the oral statement to argue that CCP, HAC and "avoid arrest" did not apply because the shooting was unintentional (T. 147-49).

Fields' oral statement was exculpatory, inconsistent with Fields' trial testimony, and impeached Fields, and thus was material. It related to the key issues of premeditation, applicability of aggravators, and the credibility of the State's key witness. Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

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[7]These failures were pled as ineffective assistance in Claim VI, on which the court denied a hearing. See Argument VII.

The lower court denied relief on this aspect of Claim II because the State's discovery response at trial listed Porter and next to his name had the notation "statement of Fields" (PC-R. 5766). However, the record establishes that trial counsel was not informed of any oral statements made by Fields.

The State asked Pearl about what "statement of Fields" indicated:

> That [Porter] took the statement of Clinton Bernard Fields and I knew that because I had the written statement made by Mr. Fields taken from him by Captain Porter. . . .

(T. 204-5). Because the oral statement was never written down, and nothing disclosed in discovery indicated that Fields had given Porter an oral statement in addition to the written statement, Pearl logically assumed the words "statement of Fields" referred to the written statement he had already received. Answers to Demands for Discovery are not meant to be puzzles for one side to work through in order to discover what information the other side possesses. The court below erred in finding that the state had not failed to disclose Fields' oral statement.

Further, if Pearl could have discovered Fields' inconsistent oral statements to Porter, Pearl's failure to discover and use the inconsistent statements is further proof of Pearl's ineffective assistance. See Argument VII. In Garcia v. State, 622 So. 2d 1325 (Fla. 1993), the court reiterated that the Brady rule applied to both guilt and penalty phases in a capital case. The State is required to reveal any statements which are material

as to penalty. Fields' statements clearly were material because they eliminated aggravators. The Garcia court also held that a defense attorney's failure to use a codefendant's statement in penalty phase which corroborated the defendant's version of the shootings constituted ineffective assistance of counsel. Either the State failed to disclose Fields' statements in violation of Brady, or Pearl failed to discover and use them, in violation of his duty to render effective assistance.

The State knowingly presented false testimony and failed to disclose exculpatory evidence, contrary to due process. Gictlio; Bradv; Garcia. Robinson is entitled to a new trial and resentencing.

III. NO FULL AND FAIR EVIDENTIARY HEARING.

A. DENIAL OF FUNDING FOR WITNESSES

The court below erred in denying funding to present witnesses at the evidentiary hearing and by choosing which witnesses Robinson could present. Counsel requested expenses for 52 out of town witnesses (PC-R. 781-86), referring the court to the affidavits attached to the 3.850 and to Defendant's Compliance With Court's Order To Compel Discovery (PC-R. 712-78) as establishing the necessity of the witnesses' testimony (PC-R. 782). Counsel also offered to present in camera any additional proof the court required to justify these expenses. The State had refused to stipulate to any testimony by affidavit (PC-R. 782; see also PC-R. 6038-39).

The court denied the expenses, erroneously concluding that the testimony would be cumulative (PC-R. 1226-27). The court did grant expenses for six witnesses, and chose who those witnesses would be (PC-R. 1227; T. 568-9). Three of these witnesses could testify to events from Robinson's early childhood. The others were Pearl and Fields.

Robinson moved for clarification, objecting to the court's conclusion that most of the testimony would be cumulative (PC-R. 1232-33). The court allowed two additional attorney witnesses (PC-R. 1235). Later, counsel renewed their request for additional witness funds (T. 566-67).

The court's actions denied Robinson his right to present support for his claims. Claim III of the 3.850 alleged that Pearl failed to investigate Robinson's background for mitigation. Claim IV alleged that Pearl presented inaccurate and misleading evidence at the penalty phase. Claim V alleged Pearl did not provide Dr. Krop information for a competent mental health evaluation.[8] The theme of these claims was Pearl's failure to investigate mitigation. Post-conviction counsel attempted to present evidence to prove these claims, but was prevented from doing so when the court limited and chose the witnesses, and when the State refused to stipulate to affidavits.

Post-conviction litigation is governed by due process. See Teffeteller v. Dusser, 676 So. 2d 369 (Fla. 1996). The right to

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'These claims and the lower court's disposition of them are more fully discussed in Argument IV, infra.

call witnesses is essential to due process. Chambers v. Mississippi, 93 S. Ct. 1038 (1973). A defendant has a right to present a full and fair defense. Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987). Robinson was unable to present his case due to the court's and State's actions. This denied due process, and prejudiced Robinson.

B. THE PREJUDICE

1. Background witnesses

The lower court concluded that most of the defense witnesses' testimony would be cumulative because it had been advised of child abuse and neglect at sentencing and found that Robinson was probably abused, although the evidence of abuse was not substantial (PC-R. 1226-7). In imposing death, the court discussed Krop's testimony stating that "[m]ost of what he learned" came from Robinson, "the only source" of information about a difficult childhood was Robinson, the evidence of a difficult childhood was "uncorroborated," there was a "paucity of evidence" of a difficult childhood, "[t]here is no evidence as to how the absence of a mother affected Defendant," and that "[t]here is no credible evidence that Defendant was incarcerated as a child in an adult prison. That is merely what Defendant told Dr. Krop. No details were furnished, nor was any documentary evidence produced" (R2. 111-12)(emphasis in original). Despite its prior finding that Krop's opinions on mitigation were "uncorroborated" and based on a "paucity of

evidence," in postconviction, the trial court refused to allow Robinson to present witnesses to corroborate and establish mitigators.

Further, the court's decision to limit the evidentiary hearing witnesses failed to consider the effect on the jury of Pearl's failure to develop evidence corroborating Krop's opinions and establishing mitigation. At resentencing, the prosecutor cross-examined Krop regarding the fact that his opinions were based solely on what Robinson had reported (R2. 525, 526). The jury clearly could have concluded, as the trial court did, that Krop's opinions were "uncorroborated" and based on a "paucity of evidence." The lower court deprived Robinson of the opportunity to establish his claims.

Counsel argued that Robinson had "been hampered in [his] presentation!' and had "not had a fair hearing because of our inability to pay the expenses of people from out of town to come and testify" (T. 567). When the State said it "knew of nothing that prevented counsel from bringing these people down," the court said that was incorrect because "the only way (the defense] could get them down here is if I authorize the expense" (T. 567-68). Counsel pointed out that although the Byrds testified about Robinson's early childhood, "our affidavits cover a much longer period of his life, not just childhood. And we feel we have been hampered in our presentation in our inability to get those people here" (T. 569). Counsel reiterated that the court's selection of the three background witnesses "is too much of a limit on our

presentation" (T. 571). Counsel also objected to the court allowing trial counsel Pearl to remain in the courtroom during testimony in violation of the rule of sequestration because Pearl was a fact witness not an expert (T. 302-04), and to the court not allowing resentencing co-counsel Quarles to testify about the effect of the State's cross of Krop that his opinions relied on self-report (T. 557-59).

The court authorized expenses for three witnesses--Ethyl **Byrd,** Warner Byrd and Bennie Coleman--at the hearing. The Byrds testified to the severe abuse and neglect that Robinson experienced as a young child. When Robinson was 12, he was forced to leave home. The Byrds had no information regarding Robinson's life after that. Witnesses were available to present this mitigation at the evidentiary hearing (see Apps. 9, 10, 12, 13, 14, 15, la, 20, 21; PC-R. 719-78 (affidavits attached to Defendant's Compliance With Court's Order To Compel Discovery)), but the court denied funding.

Pearl admitted he did no real background investigation, but relied on Dr. Krop to investigate (T. 181-83), that he conducted no investigation between the first trial and resentencing, and that he talked to no mitigation witnesses other than Dr. Krop (T. 622, 624). Krop, however, did not know he was to do the background investigation (T. 263). The prejudice resulting from this lack of investigation was precisely what post-conviction counsel was attempting to present.

Contrary to the lower court's conclusion that the excluded testimony would be cumulative because it would only relate to Robinson's abusive early childhood, the testimony actually would have described Robinson's entire life up to the time of the offense. The State asked Krop to admit that most of the affidavits only described Robinson's childhood:

> No, I don't think that's accurate. . . . [The affidavits] give a descriptive account of Mr. Robinson's life from the time he was a child up until just shortly before the incident, the various people that have known him, including time when he was in prison . . . .

(T. 427). A close examination of the affidavits bears this out.[9] The affiants would have supplied specific examples of the available mitigation had Pearl investigated.

In denying Claim 111, the lower court said the **affiants'** testimony was unnecessary because it was cumulative, the court had heard the same from Krop at sentencing and the testimony would only have been that Robinson was **"a** good **person"** (PC-R. 5767, 5769). These findings were erroneous. The witnesses were necessary because they could cover much more of Robinson's life

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[9] **<u>Ten</u>** of the affidavits concern Robinson's childhood until age 12 (Affidavits of Warner Byrd, Winnie Byrd, Ethel Byrd, Bennie Coleman, Ernest Smith, William Wilson, Garfield Byrd, Elizabeth Robinson, Michael Robinson, Aaron Kane). <u>Twelve</u> affidavits concern his later life (Affidavits of Robert Hester, Johnny Robinson, Maggie Williams, Charlie Coleman, Delsey Hester, Betsy Washington, Baby Boy Hester, Jr., Troy Hester, Willie Smith, Jimmy Smith, Patricia Hester, Cora Evans). <u>Fourteen</u> affidavits concern Robinson's life after he left home, his late teens and into adulthood, right up to the time of his arrest (Affidavits of Brenda Shivers, Argie Shivers, Sylvester Scott, Mary Scott, James Scott, Hardy Scott, Sr., Hardy Scott, Jr., William Maddox, Roosevelt Scott, Winifred Scott, Larry Morris, William Gossard, Mary Martin, Jack Humphrey).

than the Byrds did (T. 569). When Krop testified at sentencing, he lacked background information. At the evidentiary hearing, Krop testified that opinions based solely on self-report are incomplete (T. 275). Indeed, at resentencing, the court found Krop's opinions "uncorroborated" and based on a "paucity of evidence" (R2. 112).

Krop testified that he had reviewed substantial background information since testifying at resentencing (T. 278-80). This information was so significant that he completely changed his diagnosis after reviewing it (T. 281-82). The court and juries may have heard mitigation testimony through Krop, but that testimony was incomplete due to lack of background information--so incomplete that he did not hesitate to change his diagnosis once he was provided reliable background information.

Further, the affiants were not only going to testify Robinson was "a good person." Instead, their testimony was necessary to supply biographical information, to establish that these witnesses were available at trial and resentencing, to corroborate the facts used by Krop to properly diagnose Robinson, as well as establish that his original diagnosis was incorrect, and to establish that several of trial counsel's arguments were incorrect.

The denial of fundings for witnesses also impaired Robinson's ability to prove Claim IV (failure to investigate led to inaccurate and damaging testimony and argument). Krop testified at resentencing that Robinson had a "psychosexual

disorder" involving "forced sex" (R2. 514). From this, Pearl argued that Robinson's sexual desires were an "S and M thing" which was "distorted" and "disordered" and "warped" (R2. 647). In postconviction, Krop testified that based upon the recently provided background information, such arguments were inaccurate (T. 294-96). Had Pearl investigated, he would have found women who would testify that Robinson has had caring and loving relationships with women that did not involve forced sex or violence (Affidavits of Brenda Ann Shivers and Cora Mae Evans, PC-R. 563-568, 570-572).

Robinson was prejudiced by trial counsel's inaccurate and damaging arguments. In post-conviction, counsel moved to present witnesses to establish this fact. The court below prevented counsel from accomplishing this.

The denial of funding for witnesses also impaired Robinson's ability to prove Claim V (failure to provide background information to Krop). At resentencing, Dr. Krop testified that Robinson has an antisocial personality disorder (R2. 513), which describes a person who routinely engages in illegal or inappropriate acts and shows no remorse (R2. 541). Krop made this diagnosis without independent background information (R2. 502, 525).

In post-conviction, Krop testified that he had now reviewed extensive background information (T. 278-80), and explained that the new information established that the criteria for diagnosing antisocial personality disorder did not exist. For example,

while Krop had previously considered Robinson's truancy from school as a criterion for the diagnosis, the new information showed that truancy resulted from Robinson's poverty, not his personality makeup. Similarly, Robinson's running away from home, previously considered a criterion for the diagnosis, was the result of escaping abuse at home, not personality. Krop also made a new diagnosis--alcohol abuse--not made before because Robinson minimized his alcohol history which the new information revealed was extensive (T. 281-88). The change in Dr. Krop's diagnoses depended upon the background information, including the affidavits, but the lower court would not hear the witnesses who could corroborate Krop's new opinions.

2. Dr. Phillips

The trial court denied expenses to bring Dr. Robert Phillips to the hearing (PC-R. 1227), finding that Robinson was not disputing Krop's diagnosis. However, Robinson was challenging Krop's diagnosis (PC-R. 6043), trying to show that he misdiagnosed Robinson due to Pearl's failure to investigate.

Postconviction counsel proffered Dr. Phillips' affidavit to show the content of his proposed testimony (App. 5). Counsel argued that Phillips' testimony was relevant to establishing that Krop misdiagnosed Robinson and that background information is essential to a proper mental health evaluation (PC-R. 6040-41, 6043-45, 6046-47). Defense counsel then summarized some of the background information which had not been provided to Krop at the time of resentencing but which Phillips had reviewed (PC-R. 6048-

57). Counsel also explained that Phillips' testimony was necessary to explain that Robinson could not be faulted for the lack of background investigation because he had no way of understanding the potential legal significance of the events in his life (PC-R. 6055-57). Counsel planned to use Phillips not only to show that Krop's diagnosis was incorrect, but to also show that the information Krop relied on was inadequate for making such a diagnosis and that Robinson could not be faulted for trial counsel's failure to investigate. Most importantly, through Phillips' testimony, counsel was trying to show that Krop's incorrect diagnosis was the result of trial counsel not investigating Robinson's background.

The lower court stated that Robinson's counsel "made no showing of any effort to obtain a local expert" instead of Phillips and did not tell the court the cost of bringing Phillips (PC-R. 5767). This statement by the court is unfair and incorrect.

The lower court never informed counsel they could obtain a local expert to testify to what Phillips was to testify to. Rather, the court made it clear that it would not hear any testimony such as Phillips' (PC-R. 1227). Further, counsel clearly informed the court of the cost of bringing Phillips to the hearing (PC-R, 781-86, 784).

Robinson was prejudiced by the court's ruling. Before the hearing, the court ruled that Robinson was not challenging Krop's diagnosis, and refused to grant expenses for Phillips (PC-R.

1227). Subsequently, regarding Claim V, the court ruled that Krop's change in diagnosis was minor at best and questioned that Krop was willing to change his diagnosis (PC-R. 5773). Had the court below said it would grant expenses for another expert, counsel would have presented expert testimony to dispute Krop's original diagnosis which the court would have found less "questionable" than Krop's own testimony.

C. CONCLUSION

By limiting and choosing the witnesses, the court below prevented Robinson from presenting testimony to prove several of his claims, violating due process. Claims III, IV and V of the 3.850 are ineffective assistance of counsel claims. Strickland v. Washington, 466 U.S. 668 (1984), requires a defendant to show unreasonable attorney performance and prejudice to prevail on an ineffectiveness claim, The testimony from the hearing establishes that no real background investigation was conducted in Robinson's case before his trial or resentencing. Post-conviction counsel attempted to present evidence to show how the lack of investigation caused prejudice, but the court prevented counsel from doing so. Robinson was denied a full and fair hearing and is entitled to a new post-conviction hearing to establish that he is entitled to relief.

IV. THE PENALTY PHASE INEFFECTIVENESS CLAIM.

Claim III of the 3.850 alleges that trial counsel failed to investigate Robinson's background for available mitigation. Claim IV alleges that trial counsel was ineffective for

presenting inaccurate and misleading evidence to the jury. Claim V alleges counsel was ineffective for not investigating to supply necessary information for Krop to perform a competent mental health evaluation. The consistent themes running through all of these claims are the lack of investigation conducted in order to uncover relevant mitigating information, and the resulting prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

A. FAILURE TO INVESTIGATE

Defense counsel's performance was deficient because counsel failed to investigate mitigation. At the evidentiary hearing, Pearl admitted that he "did not go beyond the efforts of Dr. Krop in rounding up people and their testimony," that he did not personally contact background witnesses, and that he relied on Krop to do the background investigation (T. 181-83). Pearl also did not assign anyone in his office to contact any potential mitigation witnesses (T. 182).

Pearl admitted there was no additional investigation conducted between the first trial and resentencing, and he talked to no mitigation witnesses other than Krop (T. 622, 624). Counsel's plan was to put on all the mitigation through Dr. Krop in order to avoid damaging testimony being elicited through defense witnesses on cross examination (T. 181-183).

Krop's only source of information was Robinson himself. Thus, the State was able to argue that Robinson had provided no testimony or evidence to corroborate the mitigation. The trial court noted in its original sentencing order that all of the

mitigating evidence "was furnished by Dr. Krop...who obtained all of Defendant's personal, family, and social history from Defendant" (R1. 146).

At resentencing, the State was again able to point out in cross-examining Krop that he had no evidence to corroborate what Robinson had told him (R2. 525, 526). The trial court noted the same again in its second sentencing order (R2. 112).

Krop testified that Pearl did not tell him it was his job to investigate and that is not his usual procedure (T. 262-63). Even when Pearl learned that Krop was having trouble reaching background witnesses (T. 181), he did not step in to assist Krop (T. 181-82). Pearl did not offer to assist Dr. Krop because the witnesses were in other states and "Dr. Krop is just as competent in finding people and tracking them down as I am, so I left it to him," and said he would have tried to find a witness if Krop "assigned" him to do so (T. 228-29). In other words, Pearl delegated the entire responsibility of doing a penalty phase investigation to Krop, although Pearl, in a bizarre reversal of the normal attorney/defense expert relationship, said he remained available to take "assignments" from Krop.

The one thing Pearl did do was write to Robinson the month before resentencing to get the names of "family members in Georgia" (T. 184; Def. Ex. 10). Robinson wrote back to Pearl immediately, and Pearl sent the letter to Dr. Krop (T. 184). Pearl did not attempt to contact the people identified in the letter (T. 185). Pearl did not even learn of the information

which Krop had obtained over the phone the night before resentencing until the day of resentencing when Pearl saw Krop just before his testimony (T. 186).

Krop is not trained as an investigator and expected information would be given to him by Pearl and he would "incorporate that information into the evaluation process, but not to actually do the background information" himself (T. 263-64). At the original sentencing his findings were based primarily on information provided by Robinson (T. 268). When he billed for his services after the 1986 sentencing Krop did not bill for any investigative services (T. 265).

After Krop learned there would be a resentencing, he requested that Pearl provide additional information, because he had none before the first sentencing (T. 276). Pearl then delivered to Krop his entire file and Krop reviewed it. However, the file did not provide information about Robinson's friends, family members, former employers, or anything else to help him understand and corroborate Robinson's past (T. 276). The one item Krop did receive from Pearl less than a month before resentencing was a letter Robinson had written Pearl providing names and phone numbers. The letter was sent to Krop with a yellow post-it note on it which read:

> Dear Harry: Just received this letter from Johnny Robinson. It may contain sources of information/background previously untapped. Sincerely, Howard.

(T. 270; Def. Ex. 16). The night before resentencing, Pearl said he had not contacted the people named in the letter and told Krop

to try to contact them (T. 272-73). Krop then reached three people. However, they were "very guarded" in talking with him, indicating they had never heard of him. He obtained only "very superficial" information from them (T. 273, 378).

Attorney expert Pat Doherty (T. 467-71) reviewed extensive records about this case (T. 480-81), and stated his opinion that Pearl rendered ineffective assistance at resentencing by performing below the standard of reasonably effective counsel (T. 482). Specifically with regard to the background investigation, Doherty testified it is "absolutely without a doubt essential in every capital case to find the witnesses to [the defendant's] life," because "that is essentially what is on trial in a capital case" (T. 496). He testified that the witnesses in this case whose affidavits he read told "an unbelievable story" (T. 498), "one of the single most compelling stories I have every heard" (T. 539).

Doherty testified that a reasonably competent lawyer either actually goes to find background witnesses prior to penalty phase or supervises others who do it for him (T. 499-500). While it is smart to hire a mental health expert, it is not competent to hand off to the mental health expert the complete responsibility to track down witnesses. "That's malpractice." (T. 500).[10]

"Doherty testified it was not reasonable for Pearl to leave the penalty phase to Krop because of his fear that lay witnesses would be "loose cannons." First, a lawyer cannot know if a witness is a "loose cannon" until he at least talks to him or her (T. 501). Pearl's theory was "self-defeating. It is a theory that has no resemblance to a rational theory to defend somebody" (T. 502). Although reasonable lawyers might differ on whether or

Doherty disagreed that all the information about Robinson's past came out through Krop, noting that what did come out about Robinson's childhood was presented only in a "blenderized, sanitized way" (T. 507). Doherty also noted that Krop's diagnosis of '@sociopath and sexual predator" was hardly mitigating (T. 508). In his opinion the result of resentencing would have been different if the additional mitigation he reviewed had been presented (T. 508). As it was, however, Johnny Robinson's "real life never was on trial" (T. 515).

Doherty testified that penalty phase preparations need to begin at the very beginning of the case and not wait until the last minute (T. 492). Pearl's explanation for not contacting witnesses, in addition to the fact that he does not normally use them anyway, was that, "the people we are talking about were up in Georgia and Virginia and other states, and the only way that any of us could reach them would be by telephone, and Dr. Krop is just as competent in finding people and tracking them down as I am, so I left it to him" (T. 228-29). Doherty commented that finding mitigation witnesses is not always a pleasant task, but, to put it bluntly, you "have to get off of your chair, get in

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not to present a certain witness, there can be no difference of opinion on whether a lawyer talks to those witnesses before making a decision (T. 541).

Second, Pearl's decision to leave the penalty phase to Krop was not reasonable because he knew this approach did not work in 1986. The cross by the State, the Court's comments at sentencing, and the court's remarks in the judgment and sentence should have alerted Pearl to the fact that none of Krop's mitigation was corroborated. It was ineffective to fail once again to corroborate any of it (T. 503-04).

your car and go do it. . . .**you** got to go out of town. You got **to go,** and you got to find them. You have got to talk to **them"** (T. 499).

Failure to investigate available mitigation constitutes deficient performance. Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. **Dugger,** 654 So. 2d 107 (Fla. 1995); Deaton v. Sinsletary, 635 So. 2d 4 (Fla. 1994); Heinev v. State, 620 So. 2d 171 (Fla. 1993); **Phillips v. State,** 608 so. 2d 778 **(Fla.** 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 so. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. **2d** 1082 (Fla. 1989); Bassett v. **State,** 541 So. 2d 596 (Fla. 1989). Despite the uncontroverted evidence that Pearl did no penalty phase investigation, the lower court found his performance was not deficient because Robinson did not provide information, witnesses would have been hard to locate, lay witnesses would be more vulnerable on cross than Krop, and not presenting lay witnesses kept out damaging evidence about Robinson the State would have presented (PC-R. 5767-71). The lower court also stated, **"Any** inaccuracy which existed was because Defendant would not provide information about his **past"** (PC-R. 5772).

The lower court's conclusion that Pearl's performance was not deficient because Robinson did not cooperate is utterly contrary to the record. The record contains substantial proof of Robinson's cooperation at both sentencings.

At the first sentencing, Krop testified: **"So,** Robinson understood that what he told me was to be kept in confidence and

I believe that led to him being very open and candid in terms of his disclosing information both about his background history" (R1. 751). In explaining why he could not corroborate information, Krop blamed it not on Robinson's lack of cooperation, but on time constraints and the nature of Robinson's background: "In this particular case and partly because of the nature of Robinson's background, I really did not have any way of, at least within the time period I had, to verify, talk to family members and so forth. Basically, there just isn't a lot of family members--there just isn't a lot of family in this particular case and of course that's one of the problems in this situation" (R1. 752). Pearl then asked, "He did not have family, if any, that were close enough to him to know that much about him?" Krop answered, "That's correct. That's the impression I got" (R1. 752). Pearl himself recognized that there was not a lack of cooperation on Robinson's part, just a problem on Krop's part of contacting family members. (It is worth noting here that at least twenty-five of the affidavits proffered to the lower court are from non-relatives of Robinson.)

It also appears that at the first penalty phase Robinson was embarrassed to listen to testimony about certain events in his past, as Pearl explained to the court:

> Your honor, in talking to Mr. Robinson, at first he wanted -- what he wanted me to do was to stop Dr. Krop from talking about family and personal matters because they are deeply embarrassing and humiliating to him. Finally, after considerable tears, he finally said I can go ahead and present what I thought I had to present, but he requested leave to be absent from the

> courtroom during that testimony because he feels that he couldn't bear the humiliation.

(R1. 755). Significantly, however, despite his discomfort with this testimony, Robinson did not prevent Pearl from presenting it.

After the first penalty phase, Robinson certainly did not show any lack of cooperation in discussing his background. He tried very hard to correct mistakes about the extent of his criminal record (R1. 892). When he spoke to the preparer of the presentence investigation (R1. 106) he told about his employment history, gave the name of his relative Troy Hester on Media Street in Philadelphia, identified his elementary school in Mappsville, Virginia, gave the name of the teacher's college in Baltimore, Maryland where he earned his degree while in the Maryland State Prison, identified his ex-wife Joan and daughter Tikesha in Miami, told about spending a lot of his time in farm labor camps, and told about relatives in Delaware or Maryland and Georgia (PC-R. 3933, 3939, 3940).

Krop's interview notes show that Robinson was not uncooperative (St. Ex. 3). On the notes of 3/4/86 Krop wrote that Robinson was "a good historian, good at detail, cooperative, appeared honest, frustrated." The notes of 12/9/88 reflect that Robinson was "cooperative" but "pessimistic." Krop testified that Robinson responded to all questions asked and never refused to answer a question or give information (T. 450).

The problem is that no one followed up on the information. When Robinson told about his sixth grade education in Virginia,

someone, i.e., Pearl or his investigator, should have followed up by asking Robinson when he went there, who his teachers were, who his classmates were, and then by going to Virginia to talk to teachers, administrators or others who attended the school. That would have led to information such as that in the affidavits of Aaron Kane, Robinson's elementary school teacher, and Ernest Smith, Robinson's elementary school classmate (State Ex. 10). When Robinson told that he had been an auto mechanic and worked for a newspaper, someone, i.e., Pearl or his investigator, should have followed up by asking where, when, and for whom. Those questions would have led to the discovery of Sylvestor Scott, Mary Scott, James Scott, Hardy Scott, Hardy Scott, Jr., Roosevelt Scott, William Maddox, and Ray Hutchinson, all of whom knew Robinson as a result of his past employment (State Ex. 10). When Robinson told that he had been locked up at age 13 for a B and E in Belle Glade, someone, i.e., Pearl or his investigator, should have followed up by asking why, what were you doing down there, and who did you live with. Someone asking those questions could have found Jack Humphrey, Mary Alice Brezia Martin, Winifred Lovett, and perhaps many others who could have testified about Robinson's life on his own as a young teenager in the migrant farm system (State Ex. 10). When Robinson told about his Maryland incarceration, someone, i.e., Pearl or his investigator, should have asked whether he participated in any work in the prison, and whom he got to know there. Those questions would have led to the discovery of Larry Morris and William Gossard, or

others like them, who knew about Robinson's good record in the prison (State Ex. 10). When Robinson told Dr. Krop and the PSI preparer Troy Hester in Philadelphia, someone should have asked appropriate questions to locate him. They could have found both Troy Hester and Pat Hester in Philadelphia who could have told them more about Robinson's life and about the good deeds he did for them in a time of crisis (State Ex. 10).

When Pearl visited Robinson before resentencing, he made notes (Def. Ex. 12), including reference to the Maryland penitentiary, the Maryland parole commission, and cousins in Virginia named Carl Vickers and Audrey Vickers. Pearl even noted, "Al Manning knows where they live." Pearl testified he did not follow up on that information because he expected Krop to do it (T. 188). So it never was done.

When Pearl wrote to Robinson on 1/18/89 to say that it occurred to him that Robinson had relatives in Georgia, Robinson wrote back immediately, giving not only the name and phone number of his biological father in Georgia, but also the name and phone number of non-relative Corine Smith in Virginia (Def. Exs. 10 and 11). In other words, Robinson gave even more information than Pearl requested, in spite of Pearl's invitation to Robinson not to give the information: "Of course, you're not reauired to give me that information if you prefer not to" (Def. Ex. 10). Robinson's immediate response to Pearl's letter verified the fact that he had cousins in Georgia but did not know exactly where. Rather than returning to talk with Robinson further, or following

up with phone calls himself, Pearl just forwarded the letter to **Krop,** who made the brief phone calls the night before resentencing (T. 184-85, 272-73). A timely follow-up call or visit just to Corine Smith would have opened Pearl's eyes to all the family members and friends in and around Mappsville, Virginia who knew Robinson's history (State Ex. 10).

Robinson remained cooperative even during resentencing. When co-counsel **Quarles** recognized that **they** were **"a** little shy on **mitigation"** (T. **555),** he wrote a note to Robinson in court asking for information. Robinson gave him the name and phone number of Brenda Ann Robinson in Valdosta and identified Ann P. Wyatt and Forrest Wyatt in **Withams,** Virginia, who knew about his elementary school days. He also identified Richard C. Upshaw, Jr. in Accomack, Virginia, who was the principal of North Accomack Elementary School (Def. Ex. 16).

Robinson could not do his penalty phase investigation himself; he **was in jail.** He had an attorney to do that for him. It would be the unusual defendant who would carry with him **up-to-**date **addresses** and phone numbers of all of those people from his past who knew about his life and who would recognize the importance of all those people in a penalty phase. All that can be reasonably expected is that the defendant give the information he has, when asked, and Robinson did that, Then it is up to the attorney or his investigator to ask the kinds of questions investigators always ask when they are trying to find people. There are a multitude of ways that competent attorneys and

investigators can locate people with very little information beyond the name and state of prior residence. The fact that the information given by Robinson was never followed up is not the fault of Robinson and certainly is not proof of lack of cooperation on his part.

All of this uncontradicted evidence in the record demonstrates absolutely no support for any suggestion that Robinson failed to provide information about his background prior to resentencing. Even if the record did support "reluctant cooperation," however, the case law indicates that mere reluctance to get family members involved or to provide information to counsel is not an excuse for counsel not to conduct an investigation of his own. In Blanco v. Sinsletarv, 943 F.2d 1477 (11th Cir. 1991), the defendant indicated he did not want any evidence offered in penalty phase. The State raised that as a defense to the claim that counsel rendered ineffective assistance. The court commented:

> ...[T]his court has held that a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: "The reason lawyers may not blindly follow such commands is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit."

943 F.2d at 1501-02.

The reasoning in Blanco was recognized and approved in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). There the Court distinguished Koon's claim that his attorney had been ineffective

from Blanco's similar claim by pointing out that Koon's attorney had in fact investigated potential mitigating evidence before trial while Blanco's attorney had not. The Court pointed out that counsel must evaluate potential avenues and advise the client of those offering potential merit before he may follow a client's instruction not to present penalty phase testimony.

The lower court also relied upon Pearl's "loose cannon" theory of handling the penalty phase, as if that constituted some sort of strategy decision not to investigate. However, "the mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactic must be reasonable under the circumstances." Cave v. Sinsletarv, 971 F.2d 1513, 1518 (11th Cir. 1992). It cannot possibly be reasonable strategy to fail to investigate.

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the two defense attorneys presented no evidence at penalty phase. Each thought the other was preparing for penalty phase, so neither investigated Harris' background. The State argued that the two attorneys each reasonably believed that the other was investigating the client's background (much like Pearl claims to have relied on Krop). The State also argued that the proffered "good character" evidence would have provided a "spring-board" for the prosecutor to inquire into Harris' numerous prior crimes (much like Pearl's "loose cannon" explanation). The court acknowledged that an attorney is not obligated to present mitigation evidence if, after reasonable investigation, he

determines that the evidence would do more harm than good. But, he has to investiaate first:

> [S]uch decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect. [I]gnorance [of what evidence was available] precluded [counsel] from making strategic decisions on whether to introduce testimony from Harris' friends and relatives.

874 F.2d at 763.

In Heinev v. State, 620 So. 2d 1 (Fla. 1993), the court held that Heiney's trial attorney could not have made a reasonable strategic choice not to present mitigation because he did not investigate his client's background and did not even know what potential mitigation existed. Pearl was in the same position.

The lower court also ruled that Pearl's use of Krop alone limited the State's ability to cross-examine and attack the mitigation by contradicting "good character" testimony with bad things from Robinson's record. However, this "strategy" suffers the same flaw as the "loose cannon" strategy, because it cannot be reasonable strategy not to investigate. Without investigation, without knowing what lay witnesses were available, and without knowing what they would say, Pearl could not weigh the alternatives. This was not a strategy decision, but an abdication of the responsibility to prepare the penalty phase.

Although it is apparently the lower court's belief that Pearl limited cross-examination concerning harmful matters when he presented only Krop, the case law says he did just the opposite. The presentation of Robinson's life through Krop

opened just about every door to cross-examination, whereas a careful presentation of life history through witnesses with personal knowledge would not have done that. That is clear under the case law which existed at the time of resentencing." To limit cross-examination all Pearl had to do was put on fact witnesses and stay away from opinions and character testimony.

Pearl admitted he did not have sufficient knowledge of available mitigation to make a proper strategic choice. When he was asked how a school teacher testifying to Robinson's poverty would open doors for harmful information, Pearl said, "I have never considered that. . . [T]his is all hypothetical because I don't know what that witness would have said had she testified." When asked how evidence Robinson was beaten by his father would

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"In Parker v. State, 476 So. 2d 134 (Fla. 1985), and Muehleman v. State, 503 so. 2d 310 (Fla. 1987), this Court held that even if a defendant in penalty phase waives the mitigating factor of "no significant prior criminal history" the State can ask a testifying mental health expert about the defendant's criminal history in order to impeach the basis for the expert's opinion. Therefore when Pearl put Krop on the stand, he opened the door to cross-examination about Robinson's entire history.

If Pearl's strategy was to limit inquiry into the bad things in Robinson's background, he could have accomplished that in two ways. One method was to elicit testimony from witnesses about the facts of Robinson's life and their knowledge or opinions about his character traits. The witnesses could have been cross-examined about the character testimony and the State could have presented any evidence relating to the character traits. That method would have opened fewer doors than were opened by Krop, but would still have allowed some bad evidence to come in. The second method was to elicit only fact testimony from the witnesses about their contacts with Robinson during his life, his jobs, his education, his record in prison, his drinking, his good deeds, etc. That would not have opened any doors for the State to present evidence of arrests or anti-social behavior. See Hildwin v. State, 531 So. 2d 124, 128 n.1 (Fla. 1988). Compare Geralds v. State, 601 So. 2d 1157 (Fla. 1992) with Bonifav v. State, 626 So. 2d 1310 (Fla. 1993).

open doors to bad things, Pearl said, "It's very difficult to hypothesis and speculate on these things because I don't know what the testimony would have been exactly. I don't know what those witnesses would have known exactly.' (T. 607-08).

Pearl failed to investigate and thus had no basis for making any strategy decisions. His performance was deficient.

B. THE FAILURE TO INVESTIGATE PRECLUDED THE SENTENCERS FROM HEARING SUBSTANTIAL MITIGATING EVIDENCE

Had Pearl investigated, he would have discovered a wealth of mitigation evidence. Ethyl and Warner Byrd testified at the hearing. The trial court commented during Ethyl Byrd's testimony that "she's obviously a very nice lady, makes a credible witness" (T. 42). She was anything but a "loose cannon."

Mrs. Byrd's testimony would have corroborated mitigating factors. She had known Robinson by the name "Jimmy" since he was a small child, because she lived only about 500 feet from his house (T. 24-25). She knew the people he lived with, Janie Hester and Baby Boy Hester, after his parents "dropped him off" at their house and left (T. 25, 28). She observed Baby Boy beat Jimmy with "belts, electric cords or whatever," leaving welts and bruises, and she never saw him show any affection for Jimmy (T. 29-30). She observed Janie Hester drink whiskey "quite often" (T. 30). She would watch Jimmy at night at her house when Janie went to work because if Jimmy had stayed at home with Baby Boy he would have been mistreated (T. 31). Jimmy's older brother Troy did not get beaten, and he had better clothing (T. 33). She watched Jimmy pick vegetables in the fields since he was 5 from

sunup to sundown (T. 34-35). If he stopped working, he got a beating from Baby Boy (T. 36, 50).[12]

Warner Byrd's demeanor and testimony showed that he too was not a "loose cannon." He witnessed Janie's alcohol abuse (T. 62) and the regular beatings by both Janie and Baby Boy (T. 61-62). Baby Boy beat Jimmy with "whatever he could pick up in his hand to hit him with at the time . . . like electric cord or horse whip or a belt, whatever. It didn't make no difference to Baby Boy" (T. 63). He saw Baby Boy draw blood on many occasions (T. 63). On the other hand, Troy did not have to do chores like Jimmy did, and he did not get beaten. He had good clothes, and Jimmy wore hand-me-downs (T. 63-64). After Janie died, Jimmy had to stay with whatever neighbors would feed him, including a teacher named "Mother Duffy", the Byrds, and the Smiths (T. 64-65). Robinson and others had to cut down trees in cold weather to provide wood to heat their segregated school, but it still stayed cold (T. 59-60). The students had to share books and take turns using desks (T. 60). Byrd would have been happy testify for Robinson in his sentencing, but he was never contacted (T. 67-68). The court later commented that the two Byrds "were highly credible witnesses in my opinion" (T. 568).

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[12]Ethel and others in the eastern shore of Virginia would have been very easy for Pearl to locate in 1989. she lived in Accomack County since 1933 (T. 23). All one has to do to find someone in that county is just "ask people where does so-and-so live" (T. 53). In fact, she even had a telephone listed in her husband's name in the period between 1986 and 1989 (T. 54).

Numerous witnesses were available to testify to the tragic life of Johnny Robinson. The Byrds could only testify to events in Robinson's life up until he turned 12. At 12, Robinson was thrown out of his home and the Byrds had no more contact with him.

The affidavits proffered to the lower court bolster the Byrds' testimony, but also add much more. Their content and scope is shown by the life history detailed at pages 40-110 of Robinson's motion to vacate and by the affidavits (Apps. 9, 10, 12, 13, 14, 15, 18, 20, 21; PC-R. 719-78 (affidavits attached to Defendant's Compliance With Court's Order To Compel Discovery)). In general the affidavits describe how Robinson left home at about age twelve, but still tried to keep in touch with friends and relatives periodically. When he was around he spent time with and did kind things for his nieces, nephews and cousins. He encouraged them to stay in school, and he was generous with the money he had when they needed it. He was helpful to strangers who had car trouble or needed things. He worked hard as a teenager and young adult following the seasons as a migrant worker and as a mechanic for a migrant contractor. He spent time working for a newspaper in Valdosta, a garage in Muscadine, Alabama, a company in Griffin, Georgia, and businesses on the eastern shore of Virginia. He developed a problem with drinking, and would go on binges, but did not drink around those he cared about. He gave a great deal of his own time to help his brother Troy and Troy's family in Philadelphia after Troy was shot in a

bar and almost died. He had loving relationships with women and made sacrifices to help support them. He was also a model inmate when he served time in Maryland State Prison.

One of the witnesses the defense planned to have testify at the post-conviction evidentiary hearing was Troy Hester (see PC-R. 784). Troy Hester is Robinson's uncle, although he considers Robinson his baby brother because they were raised together and Troy is only seven years older than Robinson. Hester could have testified to the abuse and neglect Robinson suffered as a child; how Robinson was thrown out at the age of twelve or thirteen and forced to fend for himself, and how Robinson's only choice for survival was migrant farm work; how brutal migrant life was, especially for a child; how Robinson, as an adult, spent months providing for the Hester family while Hester was in the hospital fighting for his life (see Affidavit of Troy Hester, PC-R. 462-72). Hester was available and willing to testify at Robinson's trial and resentencing, but was never contacted by Robinson's lawyers (Id. at 471-72).

Another witness the defense planned to have testify at the evidentiary hearing was William Maddox (see PC-R. 784). Maddox was an employer of Robinson/s. Maddox could have testified to the horrible conditions that existed for migrant workers during the years that Robinson first became part of the migrant stream; how Robinson was an excellent worker; how life in migrant camps is brutal, especially for younger people; how stressful and uncertain it is to depend on good harvests to make a living; how

Robinson always treated women with respect; how Johnny liked helping people in distress (see Affidavit of William Louis Maddox, PC-R. 487-496). Maddox was available and willing to testify at Robinson's trial and resentencing, but was never contacted by Robinson's lawyers (Id. at 496).

Another witness the defense planned to have testify at the evidentiary hearing was Brenda Shivers (see PC-R. 784). Robinson and Ms. Shivers lived together from 1970 until 1974 in a romantic relationship. Ms. Shivers can testify that Robinson was a loving, caring person during their relationship; that Robinson was not violent; that Robinson was a gentle man who never forced himself upon her physically or sexually; that Robinson was not the type of person to be violent with women (see Affidavit of Brenda Ann Shivers, PC-R. 570-572). Ms. Shivers was available and willing to testify at Robinson's trial and resentencing, but was never contacted by Robinson's lawyers (Id. at 572). Another woman Robinson had a romantic relationship with could have provided similar testimony, including the fact that she was available and willing to testify in the past but was never contacted (see Affidavit of Cora Mae Evans, PC-R. 563-568).

The testimony of these individuals, and numerous others, would have provided specific examples of the mitigation that was available had Pearl investigated. This mitigation should have been placed before the juries and court and was also necessary to provide Robinson a competent mental health examination.

Pearl ineffective assistance prejudiced Robinson. Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washinston, 466 U.S. 668, 694 (1984).[13] Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." Deaton v. Sinsletarv, 635 So. 2d 4 (Fla. 1994). Robinson was not provided with a reliable penalty phase proceeding due to Pearl's failure to investigate.

The court below erred when it found that testimony from other witnesses "would have added nothing to the hearing because the court heard this testimony from Dr. Krop at the two sentencing hearings" (PC-R. 5767). When Dr. Krop testified at sentencing, he lacked a significant amount of background information and thus reached incomplete conclusions (T. 275). In fact, the amount of background information Dr. Krop lacked was so significant that, upon receiving the information in post-

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[13]A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

conviction (T. 278-80), he completely changed his diagnosis, stating the antisocial personality disorder was an incorrect diagnosis and adding an alcohol abuse diagnosis (T. 281-88).

Clearly, the court below erred when it ruled that further testimony would have been cumulative and would have added nothing to the hearing. The evidence from the lay witnesses independently establishes valid mitigators such as abusive childhood, poverty, positive work history, history of alcohol abuse, helpful to family and friends and good behavior in prison. See Campbell v. State, 571 So. 2d 415 (Fla. 1990). Although the court and juries heard Krop's testimony, that testimony was insufficient due to lack of background information. Furthermore, trial counsel's failure to investigate resulted in a damaging misdiagnosis of antisocial personality disorder by Krop (T. 281-88).

Robinson was prejudiced by Pearl's ineffective assistance. In Phillips v. State, 608 So. 2d 778 (Fla. 1992), the only mitigation witness at penalty phase was the defendant's mother who said Phillips was a good son. In postconviction, Phillips presented the testimony of other relatives and friends who testified that Phillips grew up in poverty, his parents were migrant workers who often left the children unsupervised, and his father physically abused him. The Court rejected the State's argument that this childhood evidence was entitled to little weight, even though Phillips was thirty-six years old at the time of the homicide. The Court commented, "It cannot be seriously

argued that the admission of this evidence could have in any way affirmatively damaged Phillips' case." 608 so. 2d at 782.

In Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994), the only mitigation presented in penalty phase was the testimony of a clinical psychologist, who testified that Torres-Arboleda was very intelligent and was an excellent candidate for rehabilitation. Based upon that testimony, the jury recommended life, but the court imposed death. On appeal this Court affirmed, noting that the sole support for a life recommendation was the expert's testimony which was insufficient. During postconviction Torres-Arboleda presented mitigation that he grew up in abject poverty in Colombia, was a good student and child, and supported his family after his father's death. The new evidence provided independent corroboration for the psychologist's opinion so that he no longer had to rely exclusively upon the defendant's self report and psychological testing as the basis for his opinion.

In Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), the court reviewed a death sentence imposed after a 12-0 jury recommendation of death. The trial court had refused to find prejudice in the defense attorney's inadequate penalty phase performance because the trial court could not fathom how newly discovered mitigation could convince six jurors to vote differently, especially in light of four aggravators. This Court, however, found that counsel's sentencing investigation deprived the defendant of a reliable sentencing despite the fact

that trial counsel had presented five witnesses at penalty phase, including Hildwin's father, a couple who periodically cared for Hildwin when he was abandoned by his father, a friend, and Hildwin himself, However, that testimony was not complete. At postconviction it was shown that additional testimony could have been presented about Hildwin's mental or emotional disturbance, his history of substance abuse, his history of abuse and neglect as a child and the fact that he performed well in a structured environment such as prison.

Although at resentencing Krop testified about the poverty, abuse and neglect in Robinson's childhood, he merely scratched the surface on those subjects and did not deal at all with the other mitigation shown in the affidavits - the good deeds, hard work and kindnesses toward other people, the good record in prison, the good relationships with women, the problem with alcohol dependence, and the use of alcohol on the day of the murder. In fact, as argued infra, Krop and Pearl actually misled the jury about certain aspects of Robinson's past. Moreover, Krop's testimony refutes the lower court's conclusion that none of the basic facts have changed. Krop said his testimony to a new jury would be much different now that he knows the full context within which Robinson's criminal behavior took place (T. 302).

Here, the prosecutor dramatically called the jury's attention to the lack of corroboration for Krop's testimony (R2. 523-24). Had Quarles been allowed to testify to the effect of

that cross-examination, he would have testified that it "devastated" the mitigating factors (T. 559). Robinson was prejudiced by counsel's failure to investigate.

c. THE FAILURE TO INVESTIGATE LED TO THE PRESENTATION OF MATERIALLY INACCURATE AND FALSE INFORMATION BY TRIAL COUNSEL

Pearl presented false and misleading evidence and arguments about Robinson's life making Robinson's background more aggravating than mitigating. Pearl would have avoided this had he investigated and discovered the truth about Robinson's life, and Robinson was prejudiced by counsel's failure to do so.

The truth about Robinson's prison record was proved by placing into evidence his birth certificate which shows his birth date of July 25, 1952. This proves that the county jail sentences reflected on the PSI, already a part of the court file, were all imposed when Robinson was still a juvenile. The Maryland and Georgia Corrections records show that Robinson served only eight years, not most of his adult life, in prison prior to his arrest for this offense at age thirty-three.

The truth about Robinson's behavior during his life could not be proved at the hearing by live witnesses because of the court's order restricting defense testimony. However, the affidavits in State's Exhibit 10 describe in some detail his good deeds for others, his kindnesses toward friends and family, his hard work and job history, and his relationships with women. Dr. Krop testified that based upon this information, his testimony at resentencing was inaccurate and not a fair summary of Robinson's life (T. 296-97). Robinson's life shows more than antisocial

behavior. It shows good deeds and faithful relationships with people (T. 297). Contrary to Dr. **Krop's** testimony at resentencing, Robinson did have a history of **"formal employment"** and he worked very hard for a newspaper, and as a mechanic, driver and migrant worker. Dr. Krop testified, **"I** was really not aware of that information at the time that I testified" (T. 298). Dr. Krop also testified that possessed of this new information about Robinson, he now recognizes that Pearl's argument to the jury was misleading and inaccurate when he suggested that prison is the only place where Robinson seems to exhibit tendencies of kindness and consideration toward others (T. 298-99). Krop explained that at resentencing he did not have a **"true** picture" of Robinson's deprived life or positive relationships with others, but only knew he had committed several crimes (T. 426). Dr. Krop admitted that he mentioned migrant labor only once in his testimony at resentencing, because he was not aware at that time of the full extent of Robinson's contact with the migrant labor system (T. 299). Nor did he himself know very much about migrant life (T. 300). He explained that Robinson's extensive contact with the migrant labor system as a teenager and adult, living without adult guidance or family support, shaped his personality:

> In Mr. Robinson's case, I think what was most significant was that one of the things that I learned is that a large majority of migrant workers are there as a part of a family system within the migrant lifestyle. So, the whole family is part of the migrant movement or migrant lifestyle and in Mr. Robinson's case, from the time he was twelve years old or so, he was there pretty much on his on. So, he did not have

> the family to support or protect him, he was in a situation where he had to do that by himself, and I would certainly say that his personality, although it had already been structured and beginning to be molded by the emotional neglect and the physical abuse and the sexual abuse, the idea that he had to exist and protect as well as survive by himself at a very early age I would say certainly had a significant impact on his adolescent and then adult personality.

(T. 300-01).

Dr. Krop testified that because of the lack of specific information about Robinson's life, he gave a misleading and inaccurate diagnosis of Robinson as suffering from an antisocial personality disorder. In fact, the known evidence does not meet the criteria for that disorder, because his behavior prior to the age of fifteen could be explained by understanding his environment (T. 281-86). Moreover, Dr. Krop testified than he now knows more about Robinson's alcohol dependence that he knew at the time of the resentencing, and the alcohol dependence makes the primary diagnosis of antisocial personality disorder improper (T. 286-291). Of course, the record is clear that Robinson has engaged in antisocial behavior during his lifetime. However, Dr. Krop testified that antisocial behavior is different than an antisocial personality disorder. "An antisocial personality disorder is an enduring pattern of personality traits which are in existence in an individual beginning before the age of fifteen and continuing through adulthood" (T. 292). The importance of the mistaken diagnosis in Johnny Robinson's case is that Pearl presented the diagnosis and then argued to the resentencing jury the only thing he really could argue, that is, that Robinson

suffered from the disorder, but it would burn out over time while he was in prison. Dr. Krop testified that he could now present a much more accurate and mitigating explanation of Robinson's behavior:

> Q Based on all that you now know, would you be able to explain to a jury Mr. Robinson's involvement in this crime in a way other than, well, he's got an antisocial personality disorder, it will burn out over time?
>
> A If I were testifying today to a jury, I would testify some of the areas certainly that I have talked about in my testimony earlier today. I would discuss the migrant life, how his abusive environment and his involvement in migrant lifestyle and the drinking and the sexual abuse, putting that all together. I would say it's much more severe than I ever imagined when I testified either at the first or second hearings and I would talk about how all of those factors have a dynamic impact on his personality and have contributed in a significant way to his behavior on the date of the offense.

(T. 302). In other words, he could now explain that Robinson did not just behave in an antisocial way because he was cruel and got kicks out of it (T. 340). Based upon the evidence Dr. Krop has received during post conviction, he believes that Robinson "more appropriately fits a mixed personality disorder than an antisocial personality disorder" (T. 345). The label, however, is not as important as the explanation to the jury about why he behaves in the way he does. As Dr. Krop testified, "what has changed is the dynamics and the background factors to better explain and better understand why Robinson is Robinson" (T. 408).

At resentencing, Dr. Krop testified that Robinson had a psychosexual disorder based on repeated incidents of forced sex in his past (R2. 514). Dr. Krop testified that Robinson had a

"long history" of victimization which would make treatment of this disorder more difficult (R2. 544).

Relying on this testimony, and lacking any background information, trial counsel argued to the resentencing jury that Robinson only liked sex accompanied by force and intimidation and his sexual desires were an "S and M thing" which was "distorted" and "disordered" (R2. 647). Trial counsel even argued to the jury that Robinson was "warped" in his sexual appetites in that "he can only enjoy or have sex under situations or circumstances that most of us would find strange or would avoid" (R2. 647). Trial counsel stressed to the jury that all of this was a result of Robinson's background, yet trial counsel admitted at the post-conviction hearing that he had done no real background check (T. 181-83, 622, 624).

Dr. Krop testified at the post-conviction hearing that trial counsel's argument to the jury regarding Robinson's "warped" sexual preferences was not based on anything that Dr. Krop had reported on or testified to:

> The way Mr. Pearl was in fact describing Mr. Robinson's sexual behavior and in fact he even used the term S & M, I believe, which stands for sadomasochistic behavior and certainly I don't recall any evidence of that type of behavior in terms of any kind of pattern on Mr. Robinson's part.
>
> So certainly, yes, what he was arguing was what I would consider a psychosexual disorder or specifically a paraphilia.
>
> * * * *
>
> Q And based upon the information that you have been provided in post-conviction, do you believe that Mr. Robinson suffered from a paraphilia?

A No, I don't.

(T. 294-96). Neither Pearl nor Dr. Krop were aware at resentencing that Robinson had experienced close relationships with Cora Mae Evans, Winifred Lovett, and Brenda Ann Shivers, all three of whom have provided affidavits describing Robinson as kind, respectful and affectionate to them during the relationship, displaying no deviant sexual behavior (T. 296). Dr. Krop explained that this new information that Robinson was capable of forming and developing appropriate relationships does not change the fact that he has engaged in inappropriate and maladaptive sexual behaviors (T. 381, 385), but it gives a more complete picture of Robinson's personality and certainly shows even more clearly that Pearl's argument to the jury was inaccurate and misleading.

In summarizing the inaccuracies and the incompleteness of the presentation of Robinson's history, Pat Doherty merely echoed the case law when he testified, "I am saying really -- I am standing here talking for this proposition, which is that Johnny Robinson's life, his real life, ought to have been on trial. His real life never was on trial. . . . what I am saying is you ought to give this man's real life a chance to be weighed" (T. 515-16).

When an attorney by omission neglects to investigate and present mitigation, an individualized decision cannot be made. In the instant case, by commission, Pearl guaranteed that an individualized decision could not be made because he presented testimony through Dr. Krop, and made comments to the jury

himself, which affirmatively misrepresented the facts about Robinson, If both he and his only witness were misinformed about Robinson's life, how could the jury be properly informed?

The courts in Blanco v. Sinaletary, 943 F.2d 1477 (11th Cir. 1991) and Douslas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacate, 468 U.S. 1206, 104 S. Ct. 3575, 82 L.Ed.2d 874 (1984), adhered to on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208, 105 S. ct. 1170, 84 L.Ed.2d 321 (1985), recognized that "the most egregious examples of ineffectiveness do not always arise because of what counsel did not do, but from what he did do -- or say." 943 F.2d at 1500, 714 F.2d at 1557 (emphasis in original). That is certainly true in the instant case. Pearl compounded the harm done by his failure to investigate by eliciting misleading information from Dr. Krop and making his own misleading, inaccurate argument to the jury. Just as the attorney did in Kinq v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983), he did not merely neglect to present available mitigating evidence; he made a closing argument that surely did more harm than good.

Similar attorney behavior in Stevens v. State, 552 So. 2d 1081 (Fla. 1989), resulted in a reversal of a death sentence. There trial counsel had failed to do an adequate penalty phase investigation, but he magnified the error by his misrepresentation:

> Not only did trial counsel fail to develop a case in mitigation or to make any arguments on Stevens' behalf, he also made inexcusable misrepresentations regarding Stevens' background and criminal history

> during his penalty phase summation. In response to information presented by the prosecution, trial counsel wrongfully stated that Stevens had been dishonorably discharged from the service. Additionally, trial counsel countered incorrect information presented by the prosecution regarding Stevens' prior criminal record by misstating that Stevens had served time in a Kentucky county jail when he had not.

552 So. 2d at 1087. The court pointed out that there could not be a credible claim of "strategy" when counsel allowed the jury to hear without correction misstatements about the defendant's past. Similarly, in Harris v, Dugger, supra, part of the reason the jury was unable to assess the unique characteristics of Harris as an individual was that his attorney, in addition to neglecting to investigate and present mitigation, erroneously represented to the jury that Harris' family had turned against him. 874 F.2d at 763.

Claim IV of the motion to vacate also points out that Pearl denigrated the mitigating circumstances he did present by calling the jury's attention to the fact that they were non-statutory rather than statutory mitigators. Pat Doherty testified that he could see no tactical reason for calling the jury's attention to that distinction. The distinction "implied pretty clearly that the non-statutory mitigating factors are of lesser value, lesser weight" (T. 491). The case applicable here is Doualas v. Wainwrisht, 714 F.2d 1532 (11th Cir. 1983). There the defense attorney told the sentencing judge before penalty phase that his client had not been a good person in the past and there was no mitigation to put on. In finding the attorney ineffective and

reversing, the court pointed out the harm that can be done by an attorney who denigrates his mitigation:

> [A] vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence. This situation can be analogized to one where instead of simply not putting a defendant with a criminal record on the stand, defense counsel in closing argument says: "You may have noticed the defendant did not testify in his own behalf. That is because he has a significant prior record of convictions and we did not want the prosecutor to cross-examine him about them." Similarly, the instant case is analogous to one where the state presents its evidence, the defense presents none, but, rather than maintaining silence or arguing to the jury about reasonable doubt, defense counsel states: "You may have noticed we did not present any evidence for the defense. That was because I couldn't find any."

714 **F.2d** at 1557. In the instant case, if Pearl himself had not mentioned the absence of statutory mitigation, the jury would never have known there was any distinction between statutory and nonstatutory mitigation, and the mitigation presented would not have taken on a lesser significance.

Regarding Claim IV, the lower court stated:

> Defendant alleges Mr. Pearl made inaccurate arguments about his ability to relate to women in only a violent manner, about his employment history, and about "good deeds" Defendant has done in the past. **Any** inacauracy which existed was because Defendant would not provide information about his past.

(R. **5772)(emphasis** added). The court's conclusion that trial counsel was not provided information about Robinson's past by Robinson, is not supported by the testimony of Robinson's trial counsel. At the hearing, trial counsel read the last paragraph of the affidavit he submitted regarding his representation of Robinson:

A "**During** the entire time that I represented Mr. Robinson, I found him to be a friendly, truthful, cooperative client. **He** willingly told me what I needed to know. And, in all respects, I could find no fault in our attorney client **relationship.**"

Q Do you still agree with that statement today?

A Certainly.

(T. **596-97)(emphasis** added). Additionally, as explained in Section A, **supra,** Robinson supplied information about his life, but Pearl never followed up and investigated that information.

Further, even if it was true that Robinson was not forthcoming with information, it does not justify the inaccurate and damaging arguments that trial counsel made to the jury. Simply because trial counsel lacks information does not necessitate (or excuse) presenting false, inaccurate or baseless arguments to the jury.

Robinson was prejudiced by trial counsel's arguments to the jury. Trial counsel, sounding much more like a prosecutor, made Robinson out to be a lifelong sexual pervert in the eyes of the jury. This was completely inaccurate, Having blamed Robinson's nonexistent perversion on his background to the jury, the only argument trial counsel could make in mitigation was that although Robinson "**was** not a kind, loving considerate person," he "finally has matured" in prison (R2. 670-1). Clearly, Robinson was prejudiced.

D. FAILURE TO INVESTIGATE LED TO FAILURE TO ARRANGE FOR COMPETENT MENTAL HEALTH EXAMINATION

A criminal defendant is entitled to competent expert psychiatric assistance when the State makes his or her mental

state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

An indigent defendant is entitled to an appointed mental health expert. Fla. R. Crim. P. 3.216; Garron v. Bercrstrom, 453 so. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1st DCA 1991); State v. Sireci, 502 So. 2d 1221 (Fla. 1987). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.q., O'Callaqhan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mason v. State, 489 So. 2d 734 (Fla. 1986). The mental health expert also must protect the client's rights, and violates those rights when he or she fails to provide professionally adequate assistance. Mason v. State. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Dr. Krop failed to provide the professionally adequate expert mental health assistance to which Robinson was entitled. This was the result of trial counsel's failure to investigate and provide Dr. Krop with crucial information concerning Robinson's

background, information which would have corroborated Dr. **Krop's** testimony and provided him a basis for making accurate diagnoses.

Other than Robinson's self-report, Dr. Krop had no background information concerning Robinson. Because of this, no adequate testing was performed. A cursory interview and **pro** forma presentation of opinions based solely on what little was gleaned from such an interview is **all** the mental health "assistance" that Robinson received. This is by no means enough, Mason v. State, 489 So. 2d at 735-37, and falls far short of what the law and the profession mandate.

In denying relief on claim V, the court stated:

> Defendant alleges in Claim V that his trial counsel was ineffective in failing to investigate Defendant's background and as a result was unable to provide full information to Dr. Krop who was then unable to perform a competent mental **health** examination of Defendant. Dr. Krop testified at trial[14] that after reviewing the information contained in the affidavits provided by Defendant's new attorneys that he would change his diagnosis. However, the change in diagnosis is minor at best. The Court finds it questionable that Dr. Krop is willing to change his diagnosis without interviewing the witnesses who gave the affidavits and without further interviewing Defendant in light of this **"new evidence."** This is especially true in light of the fact that Dr. Krop met with Defendant numerous times prior to trial and even though Defendant was not forthcoming with background and family information Dr. Krop had information that Defendant grew up in poverty, was subjected to physical abuse, and was a migrant worker when he made his initial diagnosis. The Court finds it questionable that Dr. Krop is willing to change his diagnosis when he never indicated to Mr. Pearl that he didn't have enough information and exhibited no reluctance in making his first diagnosis of Defendant. The record

[14] The court below must be referring to the post-conviction hearing, not the actual **"trial."**

> conclusively shows Defendant is entitled to no relief on Claim V.

(PC-R. 5773).

Contrary to the lower court's ruling, Dr. Krop's new diagnosis was anything but minor. At resentencing, Dr. Krop testified that Robinson has an antisocial personality disorder (R2. 513). He explained that diagnosis as describing a person who routinely engages in illegal or inappropriate acts, and for whom that behavior becomes a part of their personality so that they show no remorse for the acts they commit (R2. 541). Dr. Krop made this diagnosis solely on information provided by Robinson and without background information from trial counsel (R2. 502, 525). At the post-conviction hearing, Dr. Krop detailed the new information he had been provided (T. 278-81), as detailed above, and explained why the new information was essential for a proper diagnosis and how the new information established that Robinson did not have an antisocial personality disorder, but does have an alcohol abuse disorder (T. 281-88).

At no point did the lower court explain why trial counsel was competent despite not providing Dr. Krop with crucial information concerning Robinson's background. Nor did the court explain why Robinson was not prejudiced by trial counsel's failure to provide the jury with a more accurate and favorable picture of Robinson through his only defense witness, Dr. Krop. Lastly, the court below never specifically addressed why it found that the mental health examination provided by Dr. Krop was competent. Clearly, Dr. Krop was willing to change his diagnosis

at the hearing below because post-conviction counsel supplied him with information he did not receive from trial counsel.

Robinson was clearly prejudiced by Dr. Krop's inaccurate diagnosis. In discussing Dr. Krop's testimony concerning mitigating circumstances, the trial court accepted that Robinson had a difficult childhood, but gave it less weight because all of the history was obtained from Robinson himself (R2. 112). Furthermore, the trial court rejected Dr. Krop's testimony concerning intoxication because there was no evidence to support it aside from Robinson's self report (R2. 112). Surely, the jury also considered the lack of support for Dr. Krop's opinions.

Dr. Krop's opinion and testimony based solely on Robinson's self-report thus proved to be less than convincing to Robinson's sentencers at the trial and resentencing. The Florida courts have long rejected evidence of intoxication based solely on the defendant's hearsay statements to a mental health expert. Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988); Cirack v. State, 201 So. 2d 706, 708-10 (Fla. 1967); Johnson v. State, 478 So. 2d 885, 886-7 (Fla. 3d DCA 1985). Furthermore, the standard of care expected from a competent mental health examination does not include opinions or diagnosis based solely on an interview with a subject. See, Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord, Pollack, Psychiatric Consultation for the Court, 1 Bull. Am.

Acad. Psych. & L. 267, 274 (1974); H. Davidson, _Forensic Psychiatry,_ 38-9 (2d ed. 1965).

Dr. Krop simply failed to diagnose and evaluate Robinson in _any_ reasonably professional and competent way whatsoever. Had reasonably effective counsel provided Dr. Krop with proper information or had Dr. Krop investigated and discovered the information himself, and had Dr. Krop provided a competent evaluation, there is a reasonable probability that the result in this case would have been different.

E. CONCLUSION

The consistent theme running through Claims III, IV, and V of Robinson's Motion to Vacate is the lack of investigation conducted in order to uncover relevant mitigating information from Robinson's background, This mitigating information existed at the time of Robinson's trial and resentencing, but trial counsel made no effort to uncover it. Furthermore, post-conviction counsel attempted to put this relevant information before the court below in order to show how the lack of investigation caused the outcome of Robinson's case to be unreliable. Counsel, however, was prevented from doing so when the court severely limited the number of witnesses Robinson could present, and chose who those witnesses would be.

Robinson was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Trial counsel conducted no background investigation in order to obtain relevant mitigation information. The mental health evaluation conducted in this case was not

professionally adequate. counsel failed to assure that it would be, the expert failed in his task, and the sentencers were presented with inaccurate and prejudicially harmful information. A full and fair evidentiary hearing and relief are proper.

v. ERRONEOUS **SUMMARY** DENIAL OF MERITORIOUS CLAIMS.

Although the lower court granted an evidentiary hearing on some claims, the court summarily denied the others. The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

A trial court may not summarily deny without "attach[ing] to its order the portion or portions of the record conclusively showing that relief is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Robinson's allegations. The trial court attached nothing from the record or files in this case to its order to conclusively show that Robinson is not entitled to relief.

The court below summarily denied Robinson relief on Claims VI, VII, IX, X, XII, XIII, and XIV. See Arguments VI, VII, XI. Although these claims alleged ineffective assistance of counsel, the court below ruled they were procedurally barred (PC-R. 1223-26). As to some of these claims, the court held that Robinson was improperly attempting "to relitigate substantive matters

under the guise of ineffective assistance" (PC-R. 1224, 1225, 1226). These rulings are erroneous.

Robinson's trial counsel failed to effectively function at nearly every stage of his representation. Proceedings under Rule 3.850 are not to be used as a second appeal. State v. Bolender, 503 so. 2d 1247 (Fla. 1987). Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). See also Medina v. State, 573 So. 2d 293 (Fla. 1990). Ineffective assistance of counsel cannot be raised on direct appeal. Blanco v. Wainwriaht, 507 So. 2d 1377, 1384 (Fla. 1987).

These rulings do not stand for the proposition that all ineffective assistance of counsel claims are barred in postconviction. Ineffective assistance of counsel claims are properly plead in Rule 3.850 motions. Blanco.

The Sixth Amendment requires that criminal defendants be provided effective assistance of counsel. Strickland v. Washinaton, 466 U.S. 668 (1984). Counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. "Without counsel the right to a fair trial itself would be of little consequence, . . . for it is through counsel that the accused secures his other rights." Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). Since the only way a criminal defendant can assert his rights is through counsel, counsel has the duty, inter alia, to know the

law, to make proper objections, to assure that jury instructions are correct, to examine witnesses adequately, to present evidence, and to file motions raising relevant issues. In Kimmelman, counsel's performance was found deficient for failing to file a suppression motion, thus defaulting the suppression issue. Counsel have been found ineffective for failing to object to jury instructions on aggravating factors, Starr v. Lockhart, 23 F.3d 1280, 1284-86 (8th Cir. 1994), for failing to know the law, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Garcia v. State, 622 So. 2d 1325 (Fla. 1993), and for failing to raise proper objections to evidence or argument and argue issues effectively. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Turner v. Ducrqer, 614 So. 2d 1075 (Fla. 1992).

Considering ineffectiveness claims due to failure to object does not frustrate the preservation of error rule because a defendant claiming ineffective assistance has the additional burden of satisfying Strickland. Kimmelman, 477 U.S. at 373-75. Hardman v, State, 584 So. 2d 649 (Fla. 1st DCA 1991); Menendez v. State, 562 So. 2d 858 (Fla. 1st DCA 1990). A defendant raising an ineffectiveness claim based upon counsel's failure to timely raise an issue is asserting a distinct Sixth Amendment claim with a "separate identit[y]" and "reflect[ing] different constitutional values" from the underlying claim which the

defendant asserts counsel ineffectively failed to preserve. Kimmelman, 477 U.S. at 375.

Several lower courts have determined that trial counsel's failure to object can constitute deficient performance and is properly raised in a Rule 3.850 motion. Yarbroush v. State, 599 So. 2d 245 (Fla. 1st DCA 1992) (failure to object to jury instructions); Miller v. State, 21 Fla. L. Weekly D1606 (Fla. 1st DCA 1996) (failure to object to the state repeatedly referring to the place where appellant was arrested as a "high-crime area"); Johnson v. State, 21 Fla. L. Weekly D1956 (Fla. 1st DCA 1996) (failure to object to hearsay); Puckett v. State, 641 So. 2d 933 (Fla. 2d DCA 1994) (consideration of prosecutorial misconduct claim on direct appeal does not foreclose consideration of ineffective assistance of counsel claim in postconviction stemming from same alleged misconduct); Highsmith v. State, 493 so. 2d 533 (Fla. 2d DCA 1986) (failure to object to improper departure sentence); Walker v. State, 21 Fla. L. Weekly D1957 (Fla. 1st DCA Aug. 30, 1996) (failure to request jury instruction on defendant's right not to testify); Simpson v. State, 479 So. 2d 314 (Fla. 5th DCA 1985) (failure to object to state being permitted the first and last argument when defendant did not testify); Davis v. State, 21 Fla. L. Weekly D2369 (Fla. 4th DCA Nov. 6, 1996) (failure to preserve objection to State's improper argument).

Robinson's claims are not procedurally barred. They are ineffective assistance of counsel claims properly brought under

Rule 3.850. The court below erred in summarily denying relief to Robinson on these claims.

VI.[15] NO PROPER OBJECTION TO FIELDS' REFUSAL TO TESTIFY AT RESENTENCING.

After testifying at Robinson's trial, Fields was sentenced to life in prison. Cushman unsuccessfully pursued Fields' state appeal remedies, then was appointed Assistant State Attorney in St. Johns County. Before taking office on January 2, 1989, Cushman asked prosecutor Alexander to write letters regarding Fields' cooperation to the Clemency Board as he had promised, but Alexander refused (App. 4). Cushman advised Fields through his new attorney, Larry Griggs, that he should refuse to testify at Robinson's resentencing because the State had breached the agreement (App. 4).

At resentencing, Griggs announced that Fields intended to assert the Fifth Amendment (R2. 171, 277). The court declined to find a valid Fifth Amendment claim because of the earlier grant of immunity and ordered Fields to testify. Fields refused (R2. 140-41). The court found Fields in contempt (R2. 141).

The State moved the court to declare Fields unavailable because "Fields has stated he will not testify" (R2. 284). The State did not offer any further explanation of unavailability, and the trial court did not inquire of Fields, his attorney, or the prosecutor about Fields' reasons for refusing to testify.

"Claim VI of the Rule 3.850 motion.

The State asked to read Fields' prior testimony to the resentencing jury. Quarles objected based upon Robinson's rights to confrontation, effective assistance of counsel, and present a defense (R2. 285). The court overruled the objection and declared Fields unavailable based upon his refusal to testify. The prior testimony was read (R2. 289-321). Fields' testimony was argued extensively by the prosecutor (R2. 612-638), and was relied upon by the court in imposing death (R2. 109-113, 732-38).

Although not argued, Rule 3.640, Fla. R. Crim. P., governed this situation. Fields was not absent from the state, mentally incompetent, physically unable to appear or dead. Rule 3.640. Moreover, there was "connivance," id., by the State in causing Fields to refuse to testify--the State had breached its agreement with Fields. This rule barred reading Fields' prior testimony. However, Pearl raised no Rule 3.640 objection.

Rules of procedure which apply to trials also apply to penalty phase. See, e.g., Williams v. State, 573 So. 2d 875 (Fla. 4th DCA 1991). Although rules of evidence are somewhat relaxed at capital penalty phases, rules of procedure are not. Pearl's failure to object based on Rule 3.640 was ineffective.

Even if section 90.804, Florida Statutes, controls this situation, there was not a proper inquiry into Fields' unavailability. Under § 90.804, the State had a heavy burden to prove unavailability, and the court had to inquire into the reasons for unavailability and the State's efforts to make Fields available. No such inquiry was made. When the State sought a

ruling that Fields was "unavailable" the State gave no further explanation and the court asked for none. Here, where the witness was not missing but was in court, the court should have sought a full explanation of what efforts the State had made to get Fields to testify and should have inquired to be sure that the State was not guilty of "procurement or wrongdoing" which caused Fields' refusal.

Section 90.804 provides that a witness is not "unavailable" if his refusal to testify is due to procurement or wrongdoing by the proponent of his testimony. Here, the State's procurement or wrongdoing-- breach of its agreement with Fields--caused Fields to refuse to testify.

The agreement with Fields included a promise by Alexander that he would, at the end of State appeal remedies, "write a letter indicating Fields' cooperation to the Governor and Cabinet at the Board of Pardons and Paroles" (App. 3, pp. 4-7). Alexander refused to write the letters when Cushman asked him to (App. 4). It was "wrongdoing" for the State to breach its agreement. Under § 90.804, Fields should not have been declared "unavailable," and his testimony should not have been read to the jury. See Motes v. United States, 20 S. Ct. 993 (1899); United States v. Rothbart, 653 F.2d 462 (10th Cir. 1981).

Pearl ineffectively failed to make the proper objection. Although Quarles objected, no objection under Rule 3.640 or § 90.804 was raised (R2. 285). Nor did they force an inquiry into the reasons for Fields' refusal to testify (R2. 285). Had

counsel properly objected and requested an inquiry, the court would have been required to perform one. Suarez v, State, 481 So. 2d 1201 (Fla. 1985). An inquiry would have revealed the State's wrongdoing and precluded reading Fields' testimony. Since Fields' prior testimony was the basis for the death sentence (R2. 109-13, 732-38), Robinson was prejudiced and is entitled to resentencing.

Even an isolated error of counsel may deny a defendant the effective assistance of counsel. Murray v. Carrier, 477 U.S. 478 (1986). Failure to make a proper objection to hearsay testimony is a basis for a finding of ineffective representation. See Colts v. State, 429 So. 2d 353 (Fla. 2d DCA 1983); Norris v. State, 525 So. 2d 999 (Fla. 5th DCA 1988). A criminal defense attorney is obligated to know the law. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). There can be no strategic reason for failing to raise a proper objection. Robinson's death sentence is the prejudice resulting from counsel's omission.

This claim was properly presented and should not have been summarily denied as procedurally barred. See Argument V. An evidentiary hearing and relief are proper.

VII.[16] DEFICIENT CROSS-EXAMINATION OF FIELDS.

A. PEARL WAS INEFFECTIVE IN HIS IMPEACHMENT OF FIELDS

[16] Claim VII of the Rule 3.850 motion.

The main witness against Robinson was Fields. **See** Argument I. Pearl's entire cross of Fields consisted of only seven and one-half pages (R1. 516-23).

Fields testified at trial that Robinson announced he was going to kill the victim (R1. 504). Robinson told police the gun went off accidentally. Pearl argued that Robinson's statement was true concerning the accidental first shot and that Fields' testimony was a lie (R1. 589, 592-93, 598). However, he was unable to point to any prior inconsistent statements by Fields, because he had not developed them on cross examination. Such prior inconsistent statements did exist.

Fields' oral statements to Captain Porter were consistent with Robinson's statement of how the first shot was accidentally fired and inconsistent with Fields' trial testimony. Porter revealed those statements in depositions and trial testimony in Fields' case. He testified that Fields told him that the first shot took place after Robinson called the victim a bitch and she slapped him (CFR. 583).[17] Pearl did not attend Porter's deposition, nor Porter's testimony at Fields' trial (App. 7). Pearl did not depose Porter in Robinson's case.

Fields' oral statements to Porter make Robinson's story about the voluntary nature of the trip to the cemetery much more credible. If the resentencing jury had heard about Fields' prior inconsistent statements the outcome of penalty phase would also

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[17] "CFR" refers to the record in Fields' case.

likely have been different. The statements significantly undermine the proof of four aggravating circumstances.

Pearl has admitted that the oral statements to Porter "would have been vital to my defenses" (App. 7). If he had had that information, the outcome would have been different either at guilt or penalty phase. Id. Pearl failed to take the minimal steps of attending Porter's deposition, obtaining a copy of the transcript, or attending Fields' trial.

The prosecutor established on Field's direct examination that Fields' part of his agreement with the State was to tell the truth (R1. 514). Fields could not remember the State's part of the agreement (R1. 514), so the prosecutor led Fields to testify that there was no specific agreement (R1. 515). In closing, the prosecutor argued there was no quid pro quo (R1. 615-16).

On cross of Fields, Pearl established only that Fields hoped to get some "slack" from the prosecutor, that he had immunity for his testimony, and that the prosecutor would recommend concurrent sentences for Fields (R1. 520-522). Pearl failed, however, to cross-examine Fields about the full extent of the State's promises to him, which were set forth at the very beginning of the deposition Pearl took of Fields (App. 3, pp. 4-7).

Pearl should have objected when the prosecutor misled the jury about Fields' deal. Then he should have shown the jury that Fields was getting a much better deal than the prosecutor and Fields had revealed. Pearl should have shown that the only conceivable reason for writing letters to the Clemency Board was

to attempt to reduce the twenty-five year mandatory minimum Fields was to serve. Pearl should then have argued that this provided an incentive for Fields to lie.

The failure to cross examine Fields about his expectation that he might serve less than the 25-year minimum also affected penalty phase. In penalty phase Pearl argued that the two codefendants should receive proportionate sentences (R2. 686). That argument would have been much more compelling had the jury known that Fields was hoping, with the prosecutor's help, to serve less than his 25-year mandatory minimum and that the State had promised to lobby those who had the power to reduce that sentence. Since Fields' prior testimony was read at resentencing, all of the inadequacies of Pearl's cross apply there as well.

Pearl did not ask a single question on cross about what Fields had to drink the night of the offense (R1. 516-23), and only briefly touched on Fields' drinking at Fields' deposition (App. 3). Thus, the jury did not hear all the facts regarding Fields' drinking the night in question (App. 1). If the jury had known all the facts, they would most likely have distrusted what Fields said about the events of that night.

Fields' low intelligence and susceptibility to the suggestions of the police had been the subject of a lengthy suppression hearing in Fields' case (CFR. 248-60). Almost identical testimony was presented at Fields' trial. Robinson's

jury never knew these facts because Pearl did not utilize them to attack Fields' testimony.

Pearl then allowed the State, without evidentiary support, to argue that Fields had a low I.Q., almost moron, and therefore was not smart enough to lie (R1. 614). This allowed the prosecutor to make a misleading argument using Fields' intellectual limitations to bolster Fields' credibility rather than undermine it. The facts from Fields' trial supported the argument that Fields was likely to relate the facts inaccurately to please his interrogators and the prosecutor.

Since Fields' testimony was virtually the State's entire case for both guilt and penalty, Pearl's failures in cross likely made a difference. The prosecutor has explained how important Fields' testimony was to the State's case (App. 2, 157-58).

An allegation of ineffectiveness for failing to impeach the testimony of a key state witness is sufficient to require a post conviction hearing. Brown v. State, 596 So. 2d 1026 (Fla. 1992); Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983). Robinson's allegations were specific and supported by the record. The lower court erroneously denied this claim summarily as procedurally barred. See Argument V. An evidentiary hearing and a new trial are required. See Smith v. Wainwrisht, 799 F.2d 1442 (11th Cir. 1986).

B. FAILURE TO REQUEST INSTRUCTIONS FOR WEIGHING FIELDS' TESTIMONY

Subparts 6 and 9 of Instruction 2.04, Standard Jury Instruction in Criminal Cases, would have been helpful in

weighing Fields' testimony. However, Pearl did not request them, they were not given (R1. 65, 686), and Pearl did not object after the instructions (R1. 700). Counsel has a duty to request applicable instructions. Walker v. State, 21 Fla. L. Weekly D1957 (Fla. 1st DCA Aug. 30, 1996). This failure, combined with others, deprived Robinson of a fair trial. An evidentiary hearing, see Argument V, and relief are proper.

C. FAILURE TO QUESTION FIELDS AT DEPOSITION OR TRIAL CONCERNING MR. ROBINSON'S INTOXICATION AT THE TIME OF THE OFFENSE

Pearl failed to conduct an effective deposition of Fields concerning Robinson's intoxication at the time of the offense. Pearl asked for an intoxication instruction, but it was denied for lack of proof (R1. 561-62). Pearl could have bolstered an intoxication defense for Robinson by properly deposing and crossing Fields regarding drinking the night of the offense (App. 1). Although Pearl knew that Robinson had said he had been drinking beer and either gin or vodka as well as Hennessey, Pearl asked no questions about that.

AS a result of Pearl's failures, the guilt phase and the resentencing juries had no basis upon which to find that Robinson was under the influence of alcohol. An evidentiary hearing, see Argument V, and relief are proper.

D. FAILURE TO OBJECT TO LEADING QUESTIONS OF FIELDS

Pearl should have known, from Fields' suppression hearing and trial, that Fields had very limited intelligence, vastly inferior verbal skills, and a propensity to be compliant and eager to please his police or state attorney interrogator (CFR.

248-250, 253, 255-56, 260, 648). He should have been especially vigilant, therefore, in objecting during Fields' direct examination whenever the prosecutor tried to lead Fields. Instead, Pearl did not object or move for a mistrial when the prosecutor put words into Fields' mouth concerning material issues throughout direct examination (R1. 497, 503, 508, 506, 513, 507, 514, 515, 523-24). The result was that Fields merely approved the prosecutor's words, allowing the prosecutor to repeat those words in closing argument (R1. 610, 621, 622, 623, 642, 615-16). Reasonable counsel would have called the jury's attention to Fields' susceptibility to being led.

An evidentiary hearing is proper. See Argument V.

VIII.[18] THE JURY WEIGHED INVALID AND VAGUE AGGRAVATORS.

The trial court instructed the jury to consider the "especially heinous, atrocious or cruel" (HAC) aggravating factor, which this Court later struck. Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991). The jury's consideration of this inapplicable aggravator was constitutional error. Sochor v. Florida, 112 S. Ct. 2114 (1992). Moreover, the instruction was unconstitutionally vague and encouraged the jury to find the aggravator for improper reasons. The jury also received unconstitutional instructions on "cold, calculated and premeditated" (CCP) and "avoid arrest," and was allowed to consider "doubled" aggravating circumstances, based on identical

[18]Claim XV of the Rule 3.850 motion.

facts, without being given a limiting instruction. The jury weighed multiple invalid aggravating circumstances, requiring that the death sentence be invalidated. Strinaer v. Black, 112 s. ct. 1130 (1992).

Robinson objected to the vagueness of the CCP factor and requested a special instruction (R2. 44-64, 101, 554, 572-73). The court gave the jury a modified version of the instruction (R2. 697-98).

This instruction set the jury free to rely on virtually any of the facts of the case in finding CCP and failed to convey the limiting construction of CCP. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Without a limiting construction, CCP is unconstitutionally vague and fails to narrow the class of death-eligible defendants, see Arave v. Creech, 113 S. Ct. at 1542, because it conveys the notion that simple premeditation is sufficient. Jackson. An aggravating factor that applies to every first degree murder violates the eighth amendment. Id.; Cannadv v. State, 620 So. 2d at 169 (Fla. 1993).

The instruction left the jury free to find CCP on the basis of factors other than heightened premeditation.[19] The State

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[19]For example, they were told that they could find CCP if the crime was a "witness elimination" murder (R2. 697). Obviously, this encouraged the jury to improperly "double" CCP and "avoid arrest." The only evidence to support "witness elimination" was from Fields, to the effect that Robinson said he had to kill the victim because she could identify, immediately before he shot the victim (R2. 300). Had the jury been properly instructed that CCP requires a "careful plan or prearranged design," they could well have rejected the factor, even if they believed that the crime was a witness elimination murder. The jury was also told they could find CCP if the crime was an

urged the jury to find CCP, pursuant to the instruction, based on facts unrelated to heightened premeditation or consistent with the premeditation required for first degree murder."

Robinson's jury was not instructed about the Jackson limitations and presumably found this aggravator present. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with eighth amendment error. Id.

Under Espinosa, where a Florida jury receives either the standard HAC instruction or any similar instruction that suffers from the defects identified in Godfrey v. Georsia, 446 U.S. 420 (1980), Maynard v. Cartwright, 108 S. Ct. 1853 (1988), or Shell v. Mississippi, 498 U.S. 1 (1990), the verdict is infected with Eighth Amendment error. Here, the court did not give the

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"execution" murder (R2. 687). The fatal wound was a contact wound (R2. 433). The jury may well have believed that this was an "execution" murder on that basis, even in the absence of proof beyond a reasonable doubt of heightened premeditation. Finally, the instruction allowed the jury to find CCP based on "advance procurement of a weapon" and lack of resistance by the victim (R2. 698). Neither the victims lack of resistance nor the fact that Robinson had a gun with him (in the obvious absence of any evidence of a preconceived plan to kill) had anything to do with heightened premeditation.

[20]For example, the State argued CCP applied because Robinson had a weapon before approaching the victim, who offered no resistance (R2. 628). Obviously, such facts are fully consistent with a variety of mental states, including the defense theory of negligent or accidental homicide. They do nothing to prove heightened premeditation. The State also argued that because the facts were inconsistent with the accidental homicide theory, the crime was cold and calculated (R2. 629-34). Even if true, this argument invited the jury, consistent with the instruction, to find CCP based solely on evidence that the crime was premeditated, not heightened premeditation.

standard HAC instruction. The instruction, however, given over objection, suffered from the same defects as the standard instruction and ensured that the jury would find and weigh HAC, although such a finding violated both Florida and federal law.

Prior to resentencing, the defense filed a motion to declare the statute unconstitutional, on the grounds that HAC and CCP were unduly vague (R2. 44-64). The court denied the motion, but requested the defense to prepare proposed jury instructions on both factors, noting that in doing so, Robinson would not be waiving his objection (R2. 165-66). The defense proposed instructions (R2. 100, 554). The court noted its own difficulties with construing HAC and CCP (R2. 556-57).

The court proposed modifying the requested instruction (R2. 566). The defense objected (R2. 586). After noting that the instructional issue was fully preserved (R2. 573, 606), the court again questioned whether it was possible to define HAC (R2. 586-87). The court gave a modified version of the proposed instruction (R2. 696-97).

This instruction suffers from at least two constitutional defects. First, the instruction allows the jury to find HAC if they determine that the crime was either "heinous" or "atrocious" or "cruel," and then provides definitions of those terms that provide no guidance, but are merely "pejorative adjectives" that "describe the crime as a whole." See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993). Even assuming arguendo that the definition of "cruel" or the "unnecessarily torturous" language was adequate,

the definitions of "heinous" and "atrocious" permitted the jury to apply HAC to any first degree murder.

Second, the last sentence of the instruction permitted the jury to find and weigh HAC based on anything at all that Robinson did prior to the homicide that the jury found to be "heinous" or "atrocious.11 This removed any conceivable limiting effect of the remainder of the instruction and gave the jury unlimited discretion to find HAC based on any of the facts of the case and allowed the jury to rely on the very facts that this Court held on direct appeal could not be used to support HAC. Robinson v. State, 574 so. 2d at 112.

The prosecutor seized on the facts preceding the homicide to argue that HAC applied (R2. 625), listing "actions of the offender. . . preceding the actual killing" (R2. 625-27) and concluding his HAC argument by reminding the jury they could rely on facts preceding the murder (R2. 628). The judge, presumably interpreting HAC in the same manner as he instructed the jury, found HAC applied (R2. 110-11), based on the very facts this Court held could not be relied on, given that the victim's death was instantaneous or nearly so, and that the defendants assured the victim that they did not plan to kill her, but to release her. Robinson II, 574 so. 2d at 112. Indeed, this Court has held that weighing the factor in these circumstances would be unconstitutional, Cannady v. State, 620 So. 2d at 169 (Fla. 1993). The erroneous instruction and the prosecutor's argument

urged the jury to apply an invalid aggravating factor, and it must be presumed that they did so.

Where a person other than a police officer is killed, this Court **has** required proof beyond a reasonable doubt that the dominant or only motive of the killing was to eliminate a witness in **order** for **"avoid arrest"** to apply. **Perry** v. State, 522 **So. 2d** 817 (Fla. 1988); **Herzoq** v. State, 439 So. 2d 1372 (Fla. 1983). Robinson's jury was never informed of this (R2. 696). The State argued the jury could rely on the fact that Robinson committed **acts** after the homicide in an attempt to **avoid** detection (R2. 635-36). Such acts do not prove that the homicide **was** committed in order to eliminate a witness, but there was ***no*** way ***for*** the jury to know that. The fact that a defendant kidnaps a victim **and takes** her to a secluded place to rape her does not in itself support avoid arrest. Bates v. State, 465 So. 2d 490, 492-93 (Fla. 1985). The instruction on **"avoid arrest"** offered no meaningful guidance, and thus violated the Eighth Amendment.

The **exact** same evidence was used to support CCP and **"avoid arrest."** That evidence was Fields' testimony that immediately **before** shooting the victim, Robinson said he had to kill the victim because she could identify him (R2. 300). Indeed, here, the two factors are one and the same--according to the State's theory, Robinson made a conscious decision to kill the victim **because** she could be a witness against him (R2. 630-34, 635-36).

Two aggravators based on the same facts cannot be separately weighed. **Provence** v. State, 337 So. 2d 783 (Fla. 1976); Thomas

v. State, 456 So, 2d 454 (Fla. 1984). The defense asked to inform the jury that they should not weigh separately any two aggravators based on the same facts (R2. 94-95, 564).

On direct appeal, the Court rejected this issue. The next year, however, in Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court held that the same instruction requested by Robinson should have been given. Id. at 261. The failure to give the doubling instruction left the jury free to give separate weight to CCP and "avoid arrest." Denial of the instruction was eighth amendment error, which invalidates the death sentence. Stringer.

Relying on an invalid aggravator, particularly in a weighing state, invalidates the death sentence. Stringer, 112 S. Ct. at 1139. Considering an invalid aggravator adds improper weight to death's side of the scales and depriving the defendant of an individualized sentence. Id. at 1137.

This Court did not review the effect of the error in the instructions to Robinson's jury on HAC, CCP or "avoid arrest." On direct appeal, the court never acknowledged any error in the jury instructions, Robinson, 574 So. 2d at 113 n.6, although these claims were raised on direct appeal.

The instructional errors in this case were more prejudicial than the error that required reversal in James v. State, 615 So. 2d 668 (Fla. 1993). In James, this Court struck HAC on direct appeal, leaving four aggravators and no mitigators. The court determined that the trial court's error in finding HAC was harmless. James v. State, 453 So. 2d 786 (Fla. 1984). When the

court considered the Espinosa error, however, it could not say that the error was harmless. James, 615 So. 2d at 669.

Here, as in James, this Court struck HAC on direct appeal. Here, too, the state attorney "argued forcefully" that the aggravator applied. Five purportedly valid aggravators were left after HAC was struck, but in contrast to James, the trial court here found three significant mitigating factors: that Robinson had a difficult childhood; that he was subjected to physical and sexual abuse as a child; and the absence of his mother (R2. 112). The defense psychologist also testified as to four additional mitigating circumstances rejected by the court: that Robinson was incarcerated in an adult facility as a child; that he was intoxicated at the time of the offense; that he suffers from a psychosexual disorder; and that he functions well in prison (R2. 509-20). While the court rejected those mitigators, the jury may well have accepted one or more of them. Moreover, four jurors voted for life even after having been instructed to weigh the invalid aggravating factor (R2. 713). Thus, since the error was not harmless in James, the error with respect to HAC alone cannot be harmless here. When the effect of the additional unconstitutional instructions on CCP and "avoid arrest" is considered as well, there can be no question that the multiple jury instruction errors were not harmless.

The lower court denied relief, recognizing that this issue was raised on direct appeal but specifically addressing only the doubling argument, which the court held was disposed of by

Derrick v. State, 641 So. 2d 378 (Fla. 1994) (PC-R. 1226). The lower court did not consider **Espinosa** and **James**.[21] Here, the issue was properly preserved under James and Robinson is entitled to **a** resentencing.

IX.[22] THE PUBLIC RECORDS ISSUE.

The St. Johns County Clerk failed to produce records regarding this case, despite repeated requests (App. 27). Additionally, responses from the individual police officers who investigated the case were not received when the 3.850 was filed. Post-conviction counsel also received a copy of the crime scene video just before filing the 3.850, not allowing enough time to determine if the tape was relevant to any claims or created **any new claims.**[23] The lower court erroneously denied Robinson a hearing on this claim, Ventura v. State, 673 So. 2d 479 (Fla. **1996),** and erroneously ruled that Robinson had not timely requested the Court's assistance (PC-R. 1226). Robinson presented his claim in his Rule 3.850 motion **as was** proper, State v. Kokal, and his motion was filed well before the two-year

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[21] Reliance on Derrick was also erroneous. There, defense counsel did not request a limiting instruction. 641 So. 2d at 380. Here, counsel did (R2. 94-95, 564). Further, the judge in Derrick only found one of the aggravators at issue, and expressly recognized that finding both would be improper. Here, the court found both aggravators (R2. 110-11).

[22] **Claim** XVII of the Rule 3.850 motion.

[23] **Capital** post-conviction defendants **are** entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dusser, 561 So. **2d** 541 (Fla. 1990). Courts **have** extended the time for filing 3.850 motions after Chapter 119 disclosure. Jennings v. State, 583 So. 2d 316 (Fla. 1991); **Engle** v. Dusser, 576 So. 2d 696 (Fla. 1991); Provenzano.

filing deadline. The court below should have allowed Robinson to amend his motion once he received all of the records.

X.[24] THE RACE DISCRIMINATION CLAIM.

Every prosecutorial decision about any particular homicide case in St. Johns County is significantly skewed by racial bias. Race discrimination also affects the court's selection of grand jury members and forepersons. Finally, prosecutors are prone to remind juries of the races of the victims and the defendants, as occurred here. Discrimination in all these forms pervades the justice system in St. Johns County. It also pervaded the pretrial and trial proceedings against Johnny Robinson.

A similar claim was rejected by this Court in Foster v. State, 614 So. 2d 455 (Fla. 1992), because Foster had not met the burden of showing that the State acted with purposeful discrimination in seeking the death penalty. Three dissenters argued that under the Florida Constitution a defendant may make a prima facie showing that the death sentence is imposed in a discriminatory manner by presenting evidence that racial "discrimination exists and that there is a strong likelihood it has influenced the state to seek the death penalty." Foster, 614 So. 2d at 468. Robinson makes such a showing herein.

Between 1976 and 1987, 59 criminal homicides were committed in St. Johns County.[25] Thirty-three of the victims were white;

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[24]Claim XI of Rule 3.850 motion.

[25]Post-conviction counsel obtained the raw data for these figures from Michael Radelet, who co-authored a study on race and the death penalty in Florida. Radelet and Pierce, Choosins Those

twenty-five were black; and the race of one victim was unknown. Thus, 43% of the homicide victims were black. In this same period, three death sentences were imposed in homicide cases.[26] None of these death sentences was imposed in a case where the victim was black. In terms of percentages, the death sentence was imposed in 9% of the homicide cases where the victim was white, whereas it was never imposed in a case with a black homicide victim.

Almost one-fourth (24%) of the cases in the Seventh Judicial Circuit in which blacks have killed whites resulted in a death sentence compared to 6.9% of the cases in which whites have killed whites and 0.7% of the cases in which blacks have killed blacks. Homicides with white victims in the Seventh Judicial Circuit are roughly 13 times more likely to result in a penalty of death when the victim is white than when the victim is black. and a black who kills a white is 35.7 times more likely to be sentenced to death than a black who kills a black (App. 24).

The disparities in treatment of homicide cases in St. Johns County, based on the race of the victim, are consistent with disparities well documented across the State of Florida as a whole. Radelet and Pierce, Choosing Those Who Will Die: Race

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Who Will Die: Race and the Death penalty in Florida, 43 Fla. L. Rev. 1 (1991). One homicide was excluded because the race of the victim was not reported.

[26]These figures were drawn from death sentences imposed in St. Johns County between 1977 and 1988, assuming that sentencing takes place approximately one year after the offense on average.

and the Death Penalty in Florida, 43 Fla. L. Rev. 1 (1991).[27] The pattern of race-of-victim discrimination revealed by these numbers cannot be explained by any qualitative differences between the murders committed against black people and the murders committed against white people. Black-victim murders are just as varied in their severity as white-victim murders, but the white-victim murders are treated as if they were more serious crimes.[28]

All the data raise a strong inference that decisions made by the State Attorney's office as to whether homicide suspects receive the death sentence or a lesser sentence are made on the basis of race. That inference is strengthened by the State Attorney's conduct here, part of which this Court described as a

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[27] Radelet and Pierce studied death sentences imposed in Florida between 1976 and 1987. Id. at 18. They found that a death sentence was almost six times more likely in a case with a white victim; that those killing whites in felony murders were about five times as likely to receive death sentences as those killing blacks in felony murders; that blacks killing whites in a multiple murder have a high death sentence rate of 22.9%, while the death sentence rate is only 2.8% in homicides where blacks kill more than one black; and that a black suspected of killing a white woman is 15 times more likely to be condemned than a black who is suspected of killing a black woman. Id. at 22-25. Taking all of the variables into account, Radelet and Pierce concluded that a defendant suspected of killing a white was 3.42 times more likely to receive the death penalty than a defendant suspected of killing a black. Id. at 28.

[28] Here again, broader studies of the exercise of prosecutorial discretion have found that decisions concerning how to charge homicides, which relate directly to the ultimate outcome, are closely associated with both and the victim's and the defendant's races, and are not explained by other variables, so that "race, in effect, functions as a implicit aggravating factor in homicide cases." Radelet and Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Society Rev. 587, 615 (1985).

"deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice." Robinson I, 520 So. 2d at 6.

Racially-biased prosecutorial decision-making distorts the prosecution of death cases in St. Johns County to such a degree that there is a palpable risk that the decision to seek the death penalty against Robinson is as much the product of racial bias as of appropriate considerations. The standard of review for such a case under the Florida Constitution has never been determined but should be the standard proposed by Justice Barkett in her dissent in Foster. Florida courts may, and in an appropriate case like this one should, grant their citizens more protection than is afforded by the United States Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992). Indeed, this Court's Racial and Ethnic Bias Study Commission has already recognized the fact that "defendants who kill Whites are more likely to be sentenced to death than defendants who kill African-American," Bias Study Commission Resort, 48. This Court should adopt one of the more reasonable standards for proving discriminatory intent proposed by the dissenters in McCleskey and Foster.

A capital defendant can also establish intentional discrimination through "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." McCleskey, 481 U.S. at 292-93. In rejecting McCleskey's claim, based wholly on statewide statistical disparities, the Court made it clear that "evidence

[of racial influence] specific to his own case" could have been established by indirect proof. Robinson can make that showing at an evidentiary hearing.

The right to be indicted for a capital crime by a properly impaneled grand jury is a constitutionally provided, fundamental right. Article I, § 15 (a), Fla. Const. Discrimination in the appointment of a grand jury foreperson denies due process and equal protection. Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981)(en banc).

Johnny Robinson, a black man, was indicted by the Spring Term 1985, St. Johns County grand jury. (R1. 1, 10). The foreperson, William Vanmarter, was a white male. Of the 18 grand jurors, seventeen were white, and the race of the other grand juror cannot be determined (App. 27). In 1980, blacks constituted 15% of the population of St. Johns County. Thus, they were grossly underrepresented on Robinson's grand jury.

Both the systematic nonrepresentation of blacks as grand jury forepersons and the systematic underrepresentation of blacks on the grand juries occurred over a significant period of time. For the grand jury term included in this time period, no blacks were chosen as forepersons of any St. Johns County grand jury. Robinson has shown disproportionate treatment of blacks in the selection of grand juries and grand jury forepersons.

Thus far this Court has rejected claims of discrimination respecting the selection of grand jurors and grand jury forepersons, see Andrews v. State, 443 So. 2d 78 (Fla. 1983); see

also Jackson v. State, 498 So. 2d 406, 409 (Fla. 1986); Valle v. State, 474 So. 2d 796, 800 (Fla. 1985); Burr v. State, 466 So. 2d 1051, 1053 (Fla. 1985). Those decisions were based, however, on the lower courts' finding that the selection of grand jurors and grand jury foremen was random and non-discriminatory. In light of the significant underrepresentation of blacks on grand juries and as grand jury forepersons in St. Johns County, the State bears the burden of demonstrating that the manner in which grand jurors are chosen in St. Johns County is truly race-neutral. See Valle v. State, 474 So. 2d at 799; Pitts v. State, 307 So. 2d 473, 477 (Fla. 1st DCA 1975).

The prosecutor in this case repeatedly and deliberately injected the issue of Robinson's race into the trial. Robinson I, 520 So. 2d at 6. Moreover, the prosecutor also elicited, distorted and manufactured testimony from Robinson's codefendant that Robinson had talked about killing the "white bitch" (R1. SOS-OS), and argued that the victim could not have consented because she was white (R1. 610-11).

The prosecutor's purpose was simply to remind the jurors that the victim was a white woman and the defendant was a black man. This is further evidence of the way that racial bias infects the State Attorney's office in the Seventh Judicial Circuit and its decisions concerning the prosecution of capital cases. The deliberate injection of race encouraged the jury to convict Robinson and sentence him to death on the basis of racial discrimination, rather than on the basis of the evidence.

Johnny Robinson was deprived of a fair trial and sentencing by discrimination on the basis of his and the victim's race. The court below erred in denying relief to Robinson on this claim.

X I ? OTHER INEFFECTIVENESS CLAIMS.

Pearl was ineffective for failing to object to improper prosecutorial arguments at trial (R1. 607, 608, 610, 611, 621, 622, 613-14, 615-16, 619-20, 630, 622-23, 625, 626, 629, 642, 628) (PC-R. 318-31), and resentencing (R2. 626-27, 623, 617, 620, 636-37) (PC-R. 332-40), for failing to object to the prosecutor's injection of racial prejudice at trial (R1. 504-05, 610-11) (PC-R. 254-62), for failing to properly conduct voir dire (R2. 184-268; R1. 178-395) (PC-R. 283-317), and due to a conflict of interest (PC-R. 223-53). The lower court erroneously denied most of these claims as procedurally barred. See Argument V. An evidentiary hearing and relief are warranted.

CONCLUSION

Based upon the foregoing and the record, Robinson urges the Court to reverse the lower court and grant him the relief he seeks.

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[29]Claims VIII, IX, X, XII, XIII, XIV of Rule 3.850 motion.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 10, 1997.

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